SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 109.

THE NORTHERN PACIFIC RAILWAY COMPANY

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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BRIEF FOR THE APPELLANT.

This case, known as one of the mail divisor cases, comes to this Court on appeal from a final judgment of the Court of Claims, dismissing appellant's petition.

The petition sets forth the claimed contractual relations between the parties, under which appellant carried the mails and the United States agreed to pay for that service.

The particular point of controversy arises from a reading of the act of March 3, 1873 (17 Stats., 558), which provided *inter alia:*

"For increase of compensation for the "transportation of mails on railroad routes "*upon the condition and at the rates herein-* "*after mentioned,* five hundred thousand "dollars, or so much thereof as may be nec- "essary: *Provided,* That the Postmaster "General be, and he is hereby, authorized "and directed to *readjust the compensation* "*hereafter to be paid* for the transpor- "tation of mails on railroad routes *upon* "*the conditions and at the rates here-* "*inafter mentioned,* to wit, that the mails "shall be conveyed with due frequency "and speed; that sufficient and suit- "able room, fixtures, and furniture, in a "car or apartment properly lighted and "warmed, shall be provided for route agents "to accompany and distribute the mails, and "that the pay per mile per annum shall not "exceed the following rates, namely: on "routes carrying their whole length an av- "erage weight of mails per day of two hun- "dred pounds, fifty dollars; five hundred "pounds, seventy-five dollars; one thousand "pounds, one hundred dollars; one thousand "five hundred pounds, one hundred and "twenty-five dollars; two thousand pounds, "one hundred and fifty dollars; three thou- "sand five hundred pounds, one hundred "and seventy-five dollars; five thousand "pounds, two hundred dollars, and twenty- "five dollars additional for every additional "two thousand pounds, *the average weight* "*to be ascertained in every case by the act-* "*ual weighing of the mails for such a num-* "*ber of successive working days, not less*

> "*than thirty,* at such times, after June 30, "1873, and not less frequently than once in "every four years, and the result to be stated "and verified in such form and manner as "the Postmaster General may direct: "* * *"

This act crystallized into law the practice theretofore initiated and adopted by the Postmaster General to make uniform and fixed the compensation to be paid for transporting the mail, and from the date of its passage to the adoption of Order 412, June 7, 1907, a period of thirty-four years, the uniform, uninterrupted practice of the Post Office Department was to weigh the mails quadrennially for not less than thirty successive working days, and divide the total weight carried by six or its multiple in order to ascertain and fix the average weight carried daily.

June 7, 1907, however, the Postmaster General issued Order 412, which provided:

> "That when the weight of mail is taken on "railroad routes the whole number of days "included in the weighing period shall be "used as a divisor for obtaining the average "weight per day."

As a result of this order, claimed by the petitioner to have been arbitrarily issued, without authority of law, and in excess of his power, all weights were divided by seven or its multiple, whether mail was carried three, six, or seven days

per week, and the natural result was to reduce the average daily weight and the pay proportionately. Judgment was prayed by appellant for the difference between the amount paid by applying Order 412 and what should have been paid had the daily average weight of mail carried been calculated by using the six-day divisor.

The questions of law involved have, up to the pesent time, seemed to escape a clear judicial understanding. In the original case of the Chicago & Alton Company, the Court of Claims originally held Order 412 invalid and awarded judgment to the company. Upon rehearing, the former judgment was reversed and the petition dismissed. Upon appeal to the Supreme Court of the United States, the case was voluminously briefed and twice orally argued, with a final affirmance by a divided court and without opinion.

The present case was then presented to the Court of Claims and a decision rendered dismissing same, and error of law in such decision is assigned as follows:

I.

In finding as a conclusion of law, from the facts found, that plaintiff was not entitled to recover.

II.

In finding that the Postmaster General had discretionary power under the law to issue Order 412.

III.

In not finding that Congress having definitely fixed the rate and basis of pay, it was not within the discretionary power of the Postmaster General, in the absence of an express contract or agreement so providing, to impose upon the company a lesser rate of pay or a different basis of pay with consequent reduction of compensation.

IV.

Having found that a six-day service was called for, it was error to find any lawful authority in the Postmaster General to impose upon the company, over its protest, Order 412, calling for a seven-day divisor.

V.

In not finding that as to mail routes over which the company actually carried mail but six days in the week, it was arbitrary and illegal to divide the total weight by any multiple of seven.

VI.

In finding that, notwithstanding appellant, before beginning service, expressly refused to be bound by Order 412, nevertheless said order was valid and binding upon it and controlled its pay for services rendered.

VII.

In finding that under an implied contract, appellant was bound by Order 412, which it expressly refused to accept or recognize.

VIII.

In dismissing the petition.

ARGUMENT.

The right of appellant to recover rests upon four distinct grounds:

(1) The act of July 2, 1864, authorizing the incorporation of the company, which has been declared to have been a contract as well as a law.

(2) The agreement clause of the distance circular signed in 1907, under which the company agreed to carry the mails subject to the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

(3) The act of March 3, 1873, prescribing the method of weighing the mails and fixing the rate of pay for carrying the same.

(4) The actual transportation of the mail, entitling the company to the compensation prescribed by law, if no contract was in fact or in law entered into.

I.

The Act of July 2, 1864, Authorizing the Incorporation of the Company, Which has Been Declared to Have Been a Contract as Well as a Law.

The acts of Congress, approved July 2, 1864 (13 Stats., 365), May 5, 1864 (13 Stats., 64), and March

3, 1865 (13 Stats., 526), incorporating the Northern Pacific Railroad Company and making grants of land to aid in its construction, were not only grants and laws, but contracts, under which the railroad company undertook to construct a railroad and agreed that when constructed same should be a post route and military road, subject to the use of the United States, "at such price as Congress may by law direct," and "until such price is fixed by law the Postmaster General shall have the power to determine the same."

See Burke *vs.* So. Pac. R. R. Co., 234 U. S., 669.

Menotti *vs.* Dillon, 167 U. S., 703.

U. S. *vs.* Grand Rapids R. R., 154 Fed., 131.

These granting acts were supplemented by the act of June 8, 1872 (17 Stats., 309), providing:

> "That all railway companies to which the "United States have furnished aid by grants "of lands, right of way, or otherwise, shall "carry the mails at such prices as Congress "may by law provide; and until such price "is fixed by law, the Postmaster General "may fix the rate of compensation."

At the very beginning of this discussion it should be borne in mind that by reason of the above-quoted provisions of law the Northern Pacific Railway Company was, and still is, under legal obligations to carry the mails of the United States.

It is not in the position of a free agent to negotiate terms with the Postmaster General, pending which it might lawfully decline to carry the mail, but is obliged to perform the service and be relegated to its claim that Congress has by law fixed its rate of pay, or that the terms fixed by the Postmaster General are confiscatory and unjust.

Being under such legal obligation has Congress provided the price to be paid for the service or has it left the same discretionary with the Postmaster General?

Between 1862 and 1873, as evidenced by the above-quoted laws and many others of similar import, Congress evidenced a purpose to itself fix the price to be paid for transporting the mail. Prior to 1873, there had been three acts of Congress containing provisions prescribing such rates. The first, approved July 7, 1838, authorized the Postmaster General to cause the mail to be transported "upon reasonable terms," not to exceed twenty-five per centum what similar transportation would cost in post coaches. The second, approved January 25, 1839, restricted the authority of the Postmaster General to "three hundred dollars per mile per annum, for one or more daily mails." The third, approved March 3, 1845, arranged the service in three classes, "according to the size of the mails," the "speed with which they are conveyed," and the "importance of the service," with certain

limitation of maximum price to be paid to each class.

To this point of time we are dealing with conditions affecting two free contracting agents, either one of whom was in position to decline a contract if its terms were not satisfactory and one of whom was limited by law in the amount it could pay.

Under these circumstances and with no method authorized or fixed for a uniform service or method of fixing pay, the Postmaster General was obliged to make the best contract he could with each carrier, and, with the increase of railroad routes and volumes of mail carried, this became annually more and more difficult and burdensome.

Then follows the various acts granting lands and rights of way to railroads, all containing provisions making them post routes and obligating the grantees to carry the mail at such price as Congress might prescribe, with a proviso that until Congress acted, the Postmaster General might fix the price. From the passage of the act of March 3, 1845, Congress manifested its intention that the railroad companies engaged in transporting the mails should receive an equal and just compensation, according to the service performed, said act specifically providing that the Postmaster General should—

> "Insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed."

Whilst the act prescribed the rate to be paid, it did not fix the basis upon which the rate should be computed, and so the Postmaster General, in 1867, fixed the basis by determining that maximum pay should be allowed for a service of six round trips per week. Some companies carried mails every day in the week, some did not carry them on Sundays, and some performed more than six round trips per week. All these varying conditions were existing and considered and the adjustment was applicable to all, by providing for a uniform service of six round trips per week as earning the maximum compensation. (See findings IV and XI.) Such uniform contractual service of six round trips has been ever since enforced by the Postmaster General. A uniform service having been arrived at and settled, the Postmaster General, beginning in 1867, ascertained the average weight of mail carried by weighing the mails every day they were carried and dividing the total by the number of "working" or "contract" days. The weights were taken every day in order to compensate those companies which carried the mails on Sunday, or one day more than necessary to secure maximum pay.

At this time, therefore, the Postmaster General had settled to his own satisfaction those discretionary features of the law, to wit: due frequency and speed. All railroads performing six round trips per week were to receive the maximum compensa-

tion provided for by law, with the reserved right in the Postmaster General to send mail on any other and additional trains without additional pay. Under such conditions, prevailing in 1867 and prevailing now, a train operated on Sunday was no more within the service contracted for than one or two extra trains run on week days, and every element entering into a uniform, equal and just rate of compensation became fixed and determined.

Accordingly, the Postmaster General desired these elements to be carried into law, and the act of 1873, prepared by the Postmaster General (Senate Report 478, 43d Congress, 1st Session, p. 18), was unquestionably intended to relieve him, save on purely administrative matters, of much, if not all, of the discretion which had been the cause of so much trouble and of difficult application under discretionary contracts with each separate railroad company.

The act provided:

> "That the pay per mile per annum shall "not exceed the following rates, namely: On "routes carrying their whole length an av- "erage weight of mails per day of * * * "pounds * * * dollars, * * * The average "weight to be ascertained in every case by "the actual weighing of the mails for such "a number of successive working days, not "less than thirty, at such times * * * as the "Postmaster General may direct."

Whatever may have been the state of the law prior to the act of 1873, either with respect to the rates or the basis upon which they were to be computed, there has been no indefiniteness about these matters since, and it was the express wish of the Postmaster General that there should be none.

It is, therefore, not only a reasonable, but a necessary conclusion that when Congress came to a consideration of the act of March 3, 1873 (17 Stats., 558), it was meant to be "the fixing of rate of pay" so often previously referred to and promised, and a study of the provisions of the law as enacted fully confirms this view.

1st. It authorized and directed the Postmaster General to readjust the compensation hereafter to be paid "upon the conditions and at the rates" fixed in said law.

2d. It provided that mails should be conveyed with due frequency and speed, but discretionary determination by the Postmaster General upon this point did not in any way affect the rate of pay thereinafter provided for.

3d. Certain suitable rooms, fixtures, furniture, cars, and other accommodations were to be provided, but here again the Postmaster General's discretion did not extend to the rate of pay.

4th. Pay was fixed upon an average weight of mail carried over the road, and

5th. Such average weight of mail was to be ascertained in every case "by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times after June 30, 1873, and not less frequently than once in every four years."

This definitely fixed by law the basis upon which the rates of pay should be computed. It carried out the many-times repeated proposal of Congress to so fix the price of such transportation, and it confirmed and ratified the action and recommendation of the Postmaster General that Congress should by law fix such price, and thereby deprive him of any discretion previously conferred or exercised. He had tested the average weight system; he had settled upon a six-day service as earning maximum pay, and he had urged that same be unalterably fixed by law.

We most earnestly and seriously ask the Court to carefully consider these conditions existing at the time the act of 1873 was enacted into law, because, in our opinion, a clear understanding thereof will establish that whereas Congress has at times authorized the Postmaster General to readjust compensation in certain particulars, specifically set out in the statutes giving him that authority, it

has never at any time, since the act of 1873, changed the basis upon which rate of pay must in every case be computed, and the Postmaster General has never since 1873 changed the terms of contract making six round trips per week the minimum service for maximum pay.

It was said by Mr. Justice Barney, in speaking for the Court June 2, 1913:

> "The law of 1873 made two distinct pro-
> "visions relating to payment to be made to
> "railway companies for the transportation
> "of mails: (1) the rate of a certain sum per
> "mile for the average weight of mails car-
> "ried; (2) the basis upon which this aver-
> "age weight was to be obtained; and there
> "would have been no difficulty in obtaining
> "this average weight if all of the railways
> "had carried the mails the same number of
> "days in the week."

The learned justice might have escaped even this semblance of doubt had he referred to the fact that under their contracts all railways did carry the mails the same number of days, to wit, six round trips per week. Every railroad was placed upon an exact equality as to service by the action of the Department, inaugurated in 1867 and continued to this time, of calling and contracting for six round trips per week, no more and no less.

In the light of this fact, therefore, there can be no reasonable doubt but that Congress in fixing

the rate of pay, and the basis upon which such rate was to be computed, also established the thirty working-day period of weighing, with a knowledge and clear understanding that "working" meant "contract" days as well as "secular."

There having been established, both by custom and by contract, a uniform six-day service upon all railroads, it is unnecessary to theorize as to what must be done to secure the daily average weight of mails carried by six-day or seven-day roads. They were all six-day roads, and no more difficulty should be, was, or is experienced in ascertaining such weight when carried on Sunday than in the cases where from two to twenty trains carried mail every day. All mail carried was weighed and the aggregate weights were divided by thirty, which was, and ever since has been, the whole number of "working" or "contract" days during the weighing period.

No question of difficulty has ever been suggested in ascertaining the daily average mails carried by the Pennsylvania Railroad Company between New York and Philadelphia, although probably forty trains a day perform the service. It is not the number of mail-carrying trains which controls the average, it is the total weight carried by all trains, divided by not the number of trains, but by the number of "working" or "contract" days. As a matter of fact, roads carrying the mail for

the full contract time of six round trips per week, had no real daily average, because they did not carry mail every day. They did, however, carry the mail every "working" or "contract" day, and in this light the law loses all possibility of misconstruction or misapprehension.

These are the simple, plain reasons governing the interpretation of the law of 1873. Congress was carrying out its oft-repeated promise to fix the price of carrying the mails and to see "that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed."

Congress not only specified how this should be done "in every case," but the Postmaster General wanted it done, so that he not only would be authorized but bound, beyond dispute or question, to continue the practice he had instituted under his weight circular. It was his wish to have established by law what he in his discretion had established by executive order.

The six round-trip service having been made universal, it naturally and automatically fixed the divisor six. Even as to railroads performing service on Sunday, the average could not be changed, because Sunday service never was and is not now within the contract and could be discontinued at any time without a reduction of compensation.

Some counsel have in the previous arguments in

these cases, and undoubtedly will in this, call the attention of the Court to the ordinary accepted meaning of the words "working days" as distinguished from Sundays, and both the opinions of Chief Justice Campbell and Mr. Justice Barney refer to and lend some support to this view.

Other counsel contend with force that as the act of 1873 admittedly did not provide for two or three different divisors, according to the service performed, it must have fixed the divisor six. This argument proceeds upon the theory that if the act had stopped by providing:

> "On routes carrying their whole length an average weight of mails per day of * * * pounds * * * dollars,"

it would have necessitated the Postmaster General obtaining exact averages, which, in the actual administration of the law, would have caused some embarrassment. In the case of roads carrying seven days he would have had to divide the aggregate weights by the whole number of days in the weighing period, and the word "working" could be left out of the law as superfluous. But, under such an arrangement, it would have been necessary to arbitrarily divide by seven the aggregate weights carried by other roads only six days a week. Therefore, if the act had stopped as above quoted and the Department had adopted a seven-day divisor for all routes, he would have secured for the six-

day routes an assumed and unaccurate daily average. It would seem, therefore, since the practical application of the act, as quoted, *supra,* without the modifying clause providing the method of ascertaining the daily average, would have resulted either in two divisors or an assumed and manifestly unfair daily average on the six-day routes, it would be more reasonable to construe the whole act as calling for a six-day divisor, as was done, rather than put the assumed average on the seven-day routes, performing a superior service.

It would have been and is now impossible to apply the act of 1873, either foreshadowed as above set forth, or in its entirety, to conditions as they actually existed, or as they exist now, so as to get one uniform divisor out of it, without having an assumed daily average for one or the other of the six or seven-day routes, except upon the grounds undoubtedly fixed by the Postmaster General and the law, of a common contractual service by all roads of six round trips per week and a consequent divisor of six to secure the daily average weight.

It is obvious that the clause providing how the daily averages should be ascertained, so qualifies the rest of the section that it makes its meaning more clear. It was as if Congress had said:

> "What we mean by 'average' weight per "day is the average assignable to the work-"ing days, and that is why we take pains to "insert the word 'working' at this point."

The very insertion of the word "working" established a working-day divisor, and without giving that word its ordinary and accepted meaning we render meaningless the entire proviso to the section, a result which cannot possibly receive judicial sanction.

We think enough has been said to demonstrate that with the approval and at the request of the Postmaster General, Congress in the act of 1873 undertook to carry into effect its promise to "fix the price" to be paid for transporting the mail, and as it placed beyond the power of the executive to fix the rate upon any other basis than the daily average weight of mail carried, it equally provided that such average should be ascertained by dividing the aggregate weights by thirty, the number of "working," "contractual" or "non-secular" days in the weighing period. Having so fixed the rate of pay and the basis for computing it, there was no power in the Postmaster General to change it, as he subsequently attempted to do by Order 412.

There is no dispute as to the fact that those charged with the administration of this act, and all subsequent acts relating to railway mail down to the issuance of Order 412, have construed them to mean that the BASIS upon which to compute the compensation to be paid was exactly as we have stated, and that such compensation has, during all those years been actually computed upon that basis. If there had never been another act of Congress on

the subject, Order 412 would be null and void, as contravening such construction, unless the defendant could show such construction to be in violation of the plain meaning and intent of the statute, and therefore could not be read into the contracts under which railroad companies performed the services.

It is most essential to clearly bear in mind that Congress in legislating had expressly provided:

(1) For an *annual* and not a *daily* rate per mile of compensation. Whether this rate is in the discretion of the Postmaster General is immaterial, because he has not exercised it in this case.

(2) That the rate, however ascertained, is to be applied to the average daily weight of mail as the basis.

(3) That the rate, when multiplied by the average daily weight and the number of miles, gives the aggregate compensation per annum for a given route.

If the basis of pay prescribed by Congress had been on the *annual* weight, thus coinciding with the rate, no difficulty could have arisen. All three elements—the rate, the distance and the weight would be ascertained and known, whether the roads carried the mail six or seven days in the week. In like manner, if the rate prescribed had been "per day" instead of "per annum," no difficulty could have arisen. Each road, whether operating six or

seven days, would have received exactly the same rate per pound per mile.

The danger of injustice lay in the application of an *annual* rate, whether prescribed by statute or by the Department, to "the average weight of mail *per day.*" The real question at issue is what Congress meant by the language "average weight of mail per day."

If this language means the average weight moved on the days the mail is carried, whether it be six or seven, then a road carrying 1,000 pounds per day for six days in a week, and thus carrying a total of 313,000 pounds per annum, would receive exactly the same compensation per mile as another road carrying 1,000 pounds per day for seven days or 365,000 pounds per annum. The average daily haul of each, while actually performing service would be 1,000 pounds.

The whole controversy is really due to a confusion of thought, resulting from the difficulty of applying the same *annual* rate to an average *daily* basis of service performed with respect to two classes of workers, one actually working 313 days, the other 365 per annum.

At the time Congress established the system of annual compensation, based upon the daily average weight, the majority of railroads carried mail only six days in the week, and the daily average then contemplated was clearly not the calendar day

average but the secular working or contract day average of "six round trips per week." When the railroads began to enlarge the service and included Sunday trains, natural hesitation would have been met with, if such expansion meant a reduction in the gross annual compensation. The only fair way to reckon with this more frequent service, based upon the average daily weight, without reducing the compensation per pound per annum paid to six-day routes, was to do the very thing the Department did, namely, to treat every route as a six-day route and make uniform contracts or agreements calling for a six-day service, and apply to the aggregate weight of mails carried the working day divisor of six, irrespective of whether service was performed for six or seven days. It is plain this did not result in any increase of pay to the seven-day service, either in the rate of pay or rate per annum for carrying the same volume of mail. The only effort was not to penalize them for rendering a more frequent service than their contract called for.

The history of legislation affecting this basis of pay, as distinguished from the rate to be applied to it, as well as the history of the various unsuccessful attempts to change such basis, makes it clear that Congress understood, ratified, and confirmed this action, when in 1905 and again in 1907 it made mandatory the application of the general annual

rate to an average daily weight and provided that such average should be ascertained "in every case" by actual weighing for a number of successive *working* days.

Conceding, if necessary, that the Postmaster General had a discretion over the annual rate, he has not exercised that discretion by reducing the maximum, but has attempted to vary by regulation the *basis* which Congress itself not only fixed, but has expressly declined to change or authorize him to change, and the conclusion must be that his regulation is void and the lawful, established, equitable and only just basis must be used in fixing the compensation to be paid.

The solving of the question of the validity of Order 412 does not, therefore, depend merely upon the long uniform interpretation of this statute by those charged with its administration. The method of obtaining the average daily weight of mails prior to and at the time of the passage of the act of 1873, taken in conjunction with the language of the act, shows this interpretation to be nothing more nor less than the carrying into effect of the plain purpose of Congress. This cannot be questioned without doing violence to the language of the act and to well-established rules of interpretation.

It will be seen, however, from subsequent acts of Congress, that there have been repeated legislative affirmances of this interpretation.

II.

Legislative Re-enactment.

Act of July 12, 1876.

It has shown that the basis of pay was fixed originally by the Postmaster General in 1867 as the average daily weight of mail carried, ascertained by using the working days only as a divisor and predicated upon a contractual service of six round trips per week.

It has also been shown that the act of 1873 provided the same basis of pay and that it has been so continuously construed by those charged with the administration of the law.

At the time the act of July 12, 1876, was passed, Congress had, from time to time since the year 1867, been making appropriations to pay for the transportation of the mails by the railroad companies, and the amounts arrived at and paid under said appropriations were determined always upon the basis of pay herein contended for. Congress knew the basis of pay fixed by the Postmaster General in the year 1867, and it also knew that the post-office authorities charged with the administration of the act of March 3, 1873, had understood and construed it to prescribe the same basis. This was the correct interpretation of said act in carrying out the intention of Congress, to fix by law definitely both the

rates of compensation and the basis upon which they must be computed, so that it could in the future regulate the price to be paid for railway mail service by simply increasing or reducing the rates a certain per centum. Therefore, when Congress came to reduce the compensation to be paid to the railroad companies for transporting the mails, by the act of July 12, 1876, it expressly referred to both the rates and the basis of pay, as follows:

> "That the Postmaster General be, and he "is hereby, authorized and directed to read- "just the compensation to be paid from and "after the first day of July, eighteen hun- "dred and seventy-six for transportation of "mails on railroad routes by reducing the "compensation to all railroad companies for "the transportation of mails ten per centum "per annum from the rates fixed and allowed "by the first section" of the act "approved "March third, eighteen hundred and "seventy-three, for the transportation of "mails on the basis of the average weight."

No rates are stated in the act of March 3, 1873, except those named as the maximum, and they are "the rates fixed and allowed" from which the ten per centum per annum was directed by the above act to be deducted. It could never reasonably be argued that because only the maximum rates were stated, the Postmaster General could, since the passage of the act of July 12, 1876, have the discretion to name a lower rate, and from this lower rate de-

duct a further ten per centum per annum under this act. The argument is just as strong against the authority or discretion of the Postmaster General to change the basis of the average weight, referred to in the statute. The designation of a certain per centum less than the present rates, computed upon a stated basis, necessarily fixes both the rates and the basis. It would be impossible to figure the per centum of reduction of the railway mail pay, if there were anything indefinite about either the rates or the basis upon which they were to be computed. The ten per centum reduction was to be calculated upon the rates as "fixed and allowed," by the act of March 3, 1873, "on the basis of the average weight" as ascertained at that time, and it was so calculated and deducted. It was calculated and deducted from the compensation of the railroad companies, computed upon the average daily weight, ascertained by weighing the mails every day in the weighing period (including Sundays) and dividing the total by the secular or working days only. It could never be reasonably argued, since the passage of the act of July 12, 1876, that the Postmaster General had any authority or discretion to issue and enforce any order changing the basis of the average daily weight so as to lessen the compensation of the railroad companies, and then in pursuance of said act make a further reduction thereof of ten per centum.

The argument that the Postmaster General had

the right, under the act of March 3, 1873, to fix different rates from those named in said act, so long as he did not exceed the maximum rates named (the language of the act being that the rates "shall not exceed" a certain amount), is equally fallacious, for if he had had any such authority or discretion he could have reduced the rates himself, and no act of Congress for the purpose would have been necessary.

The act of July 12, 1876, further provides as follows:

> "And the President of the United States "is hereby authorized to appoint a commis- "sion of three skilled and competent persons, "who shall examine into the subject of trans- "portation of the mails by the railroad com- "panies, and report to Congress at the com- "mencement of its next session such rules "and regulations for such transportation "and rates of compensation therefor as shall "in their opinion be just and expedient, and "enable the Department to fulfill the required "and necessary service for the public. And "to defray the expense of said commis- "sion, the sum of ten thousand dollars is "hereby appropriated out of any money in "the Treasury not otherwise appropriated."

This language is also incompatible with the idea that the Postmaster General had any authority or discretionary power at that time to change the rates of compensation to be paid for railway mail service, whether by changing the basis upon which the

rates were to be computed or otherwise, and certainly no statute has been enacted since that time giving him any greater powers in this regard. To hold that the matter of fixing the rates and basis of pay, or either of them, was at that time vested in the discretion of the Postmaster General, would be to render the appointment of the above commission a vain and useless thing, at an expense of ten thousand dollars.

This act, therefore, must be taken as another legislative affirmance of the interpretation given to the act of March 3, 1873, by those charged with its administration, and as being wholly inconsistent with the validity of said orders Nos. 165 and 412.

Act of Congress Approved June 17, 1878.

The Act of June 17, 1878, provides:

> "That the Postmaster General be, and he "is hereby, authorized and directed to read- "just the compensation to be paid from and "after the first day of July, eighteen hun- "dred and seventy-eight, for transportation "of mails, on railroad routes by reducing the "compensation to all railroad companies for "the transportation of mails five per centum "per annum from the rates for the transpor- "tation of mails on the basis of the average "weight fixed and allowed by the first section "of the act approved July 12, 1876."

The argument under the act of July 12, 1876, is equally applicable here, but it may be strengthened by noting the difference between the language of that act and the act now under consideration.

It will be remembered that the act of July 12, 1876, provided for a reduction of—

> "ten per centum per annum from the rates "fixed and allowed by the first section 'of the "act' approved March third, eighteen hun- "dred and seventy-three, for the transporta- "tion of mails on the basis of the average "weight."

The act of June 17, 1878, provides for a reduction of—

> "five per centum per annum from the rates "for the transportation of mails on the basis "of the average weight fixed and allowed by "the first section" of the act of July 12, 1876.

In the one act, therefore, we have Congress referring to the rates as "fixed and allowed" by law, and in the other to the basis of pay as "fixed and allowed by law." This language is in harmony with the declared intention of Congress, in the above-mentioned land-grant acts, to fix by law "the price" to be paid to the railroad companies for the transportation of the mails. This price could not be fixed by law, unless Congress fixed both the rates and the basis upon which they were to be computed. It was the fixing of this price by

law (by the act of March 3, 1873) that enabled Congress thereafter to regulate the compensation to be paid to the railroad companies for the transportation of the mails by simply increasing or reducing the rates a certain per centum from time to time, as in its discretion and wisdom might be necessary.

The mail-carrying railroad companies were receiving compensation at a rate, fixed by Congress, of so much per mile per annum, as determined upon the basis of pay herein contended for on behalf of the claimant and other railroad companies, when Congress, by the act of July 12, 1876, reduced their compensation 10 per centum. They were receiving compensation at the same rate fixed by Congress, less the per centum per annum, as determined upon the same basis, when Congress by the act of June 17, 1878, made a further reduction of their compensation of five per centum per annum.

The act of June 17, 1878, must, therefore, be taken as another legislative affirmance by Congress of the interpretation given to the act of March 3, 1873, and as utterly inconsistent with the validity of said Order 412.

Act of Congress Approved March 3, 1905.

The act of March 3, 1905, provides:

> "That hereafter before making the readjustment of pay for transportation of mails

> on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

This act, it will be observed, changes the weighing period from "not less than thirty," as stated in the act of March 3, 1873, to "not less than ninety" days.

It will be recalled that at the time this act was passed, Congress had had its attention especially called to the method employed by the Post Office Department of ascertaining the average daily weight of mails as a basis of pay. Postmaster General's Order No. 44, dated September 18, 1884, in effect the same as said Orders Nos. 165 and 412, had been submitted by the Postmaster General to the Attorney General of the United States for his opinion thereon. In the letter of October 22, 1884, transmitting said order to the Attorney General, the Postmaster General explained in detail the practice of the Post Office Department in ascertaining the average daily weight of mails carried as a basis of pay. The practice or method of ascertaining the average daily weight at that time was the practice or method which had prevailed ever

since the year 1867. In said letter the Postmaster General quoted the rates and method of ascertaining the average weight, as stated in the first section of the act of March 3, 1873. He then gave illustrations of the practice of the Department, and said:

> "I have thought it necessary to give the foregoing illustrations in order that the practice of this Department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute. If not in conformity with the law will you please indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon."

In his reply of October 31, 1884, the acting Attorney General advised that the said practice was—

> "correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment."

Because of this opinion said Order 44 was revoked January 16, 1885, without having been put into effect. Immediately thereafter and on January 21, 1885, in compliance with Senate Resolution of January 19, 1885, the Postmaster General transmitted to the Senate a letter giving a documentary history of the railway mail service and an explanation of the system of weighing the mails

and of computing the average daily weights. He therein said:

> "Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.
>
> * * * * * * *
>
> "The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week, the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay.
>
> "It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was

run and the greater accommodation rendered.

"The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily, and including Sunday." (Senate Ex. Doc. 40, 48th Congress, 2d session; Record, pp. 42, 43.)

The method explained in said letter, of ascertaining the average daily weight of mails carried as a basis of railway mail pay, was the method which had prevailed continuously from the year 1867 down to the date of said letter. With the fact thus brought specifically to the attention of Congress, that this method had been construed to be the meaning of Congress, as expressed in the act of March 3, 1873, and the subsequent acts upon the subject by those charged with their administration, it cannot be doubted that Congress in passing the act of March 3, 1905, intended to, and actually did, ratify, confirm and approve that construction. This act changes neither the rates nor the basis of pay, but contains the same provision with reference to said basis as that embodied in the act of March 3, 1878, and in every statute on the subject since, namely, that—

"the average weight shall be ascertained by the actual weighing of the mails for such a

number of successive working days not less than ninety."

This act, therefore, is a distinct legislative affirmance of the construction given to the act of March 3, 1873, and is inconsistent with the validity of said Orders Nos. 165 and 412.

Act of Congress Approved March 2, 1907.

If under the preceding statutes any doubt could reasonably be said to exist as to the fact that Congress had fixed by law "the price" to be paid to the railroad companies for transporting the mails, by fixing both the rates and the method of ascertaining the average daily weight as a basis of pay, certainly no such doubt can be said to exist since the passage of the act of March 2, 1907.

At the second session of the Fifty-ninth Congress (the session during which this act was passed) the Committee of the House of Representatives inserted in this bill (which was H. R. 25483) the following provisions with reference to railway mail pay:

> "The Postmaster General is hereby au-
> "thorized and directed to readjust the com-
> "pensation to be paid from and after the
> "first day of July, nineteen hundred and
> "seven, for the transportation of mails on
> "railroad routes carrying their whole length
> "an average weight of mails per day of up-
> "wards of five thousand pounds by making

"the following reductions from the present "rates per mile per annum for the trans- "portation of mails on such routes: On "routes carrying their whole length an av- "erage weight of mails per day of more than "five thousand pounds and less than forty- "eight thousand pounds, five per cent; forty- "eight thousand pounds and less than eighty "thousand pounds, ten per cent; and nine- "teen dollars additional for every addi- "tional two thousand pounds: Provided, "that hereafter the average weight per day "be ascertained, in every case, by the actual "weighing of the mails for such a number "of successive days, not less than one hun- "dred and five, at such times and not less "frequently than once in every four years, "and the result to be stated and verified in "such form and manner as the Postmaster "General may direct."

This proviso sought to change the basis of railway mail pay in exactly the same manner, and to the same extent, as that sought by said Orders Nos. 165 and 412, but it was stricken out of the bill by Congress, and the basis of pay which had existed since 1867 inserted. The changes in the rates suggested in said bill, as reported, were also modified by Congress before it passed said bill. It will be observed that this proviso omitted the word "working" from the phrase "working days," so as to require the Postmaster General to include Sundays in the number of days to be used as the divisor

for ascertaining the average daily weight. The number of working days in the weighing period is ninety, and the total number of days, including Sundays, in said period is one hundred and five.

The accompanying report from the Committee on Post-Office and Post-Roads, and two minority reports, discussed the question very fully, and showed clearly the intention on the part of the committee to be that—

> "In computing the average weight of mail "carried per day the whole number of days "such mail pay may be weighed shall be "used as the divisor."

In reporting said bill (H. R. 25483) to the House on February 6, 1907, the chairman of said committee spoke at length of the history of the divisor theretofore used in ascertaining the average daily weight of the mails carried; of the conditions leading to its establishment; of said contemplated Order No. 44; and of the adverse opinion of the Attorney General on said order. After debate occupying parts of five days, the House, as above stated, rejected said provision by striking it out of the bill. Subsequently said provision was three times brought before the House, and each time it was rejected. The House refused to change the basis of pay upon which the compensation was to be determined according to certain specified rates, but reduced the rates a certain per centum, just as

it had done on two previous occasions, once by the act of July 12, 1876, and once by the act of June 17, 1878.

On February 20, 1907, while the House in Committee of the Whole was considering this bill, the following amendment (in effect the same as the provision which had been stricken out) was offered by Mr. Murdock, to follow the provision "For inland transportation by railroad routes, $44,660,000:"

> "Provided that no part of this sum shall "be expended in payment for transporta- "tion of the mails by railroad routes where "the average weight of mails per day has "been computed by the use of a divisor less "than the whole number of days such mails "have been weighed."

A point of order was made against this amendment on the ground that it changed existing law. The chair sustained the point, observing (41 Cong. Rec., 3741):

> "The Chairman: The existing law has "received a construction by the officers "charged with the duty of administering it, "and that construction the chair feels bound "to follow. The proposed amendment "changes existing law as construed by the "proper officer by changing the divisor."

Upon appeal from the decision of the chair, its ruling was sustained (41 Cong. Rec., p. 3472).

Later, on the same day, the provision of the bill above quoted, including the said provision to change the divisor, went out upon a point of order (41 Cong. Rec., 3473). Thereafter, on the same day, the rules were suspended and the following provision changing the rates, and without the provision changing the divisor, was inserted in the bill, in which form it was passed and thereafter approved March 2, 1907:

> "The Postmaster General is hereby author-
> "ized and directed to readjust the compensa-
> "tion to be paid from and after the first day
> "of July, nineteen hundred and seven, for the
> "transportation of mail on railroad routes
> "carrying their whole length an average
> "weight of mails per day of upward of five
> "thousand pounds by making the following
> "changes in the present rates per mile per
> "annum for the transportation of mail on
> "such routes, and hereafter the rates on
> "such routes shall be as follows: On routes
> "carrying their whole length an average
> "weight of mail per day of more than five
> "thousand pounds and less than forty-eight
> "thousand pounds the rate shall be five per
> "centum less than the present rate on all
> "weight carried in excess of five thousand
> "pounds; and on routes carrying their
> "whole length an average weight of mail per
> "day of more than forty-eight thousand
> "pounds the rate shall be five per centum

"less than the present rates on all weight
"carried in excess of five thousand pounds
"up to forty-eight thousand pounds, and for
"each additional two thousand pounds in
"excess of forty-eight thousand pounds at
"the rate of nineteen dollars and twenty-
"four cents upon all roads other than land
"grant roads, and upon all land-grant
"roads the rate shall be seventeen dollars
"and ten cents for each two thousand
"pounds carried in excess of said forty-
"eight thousand pounds."

As to how far the proceedings in Congress may be considered for the purpose of ascertaining the intention of Congress in passing any act, see United States *vs.* Maye's Adm'r, etc., 12 Wall., 177; 20 L. Ed., on page 382; Standard Oil Co. *vs.* United States, 221 U. S., 1, 50; L. Ed., on page 641.

The action of Congress in passing this act was no more deliberate than its action in striking out the provision to change the divisor, and yet the Postmaster General on the very day that this act was approved, and in excess of his powers under the law, issued said Order No. 165, which was thereafter amended by said Order No. 412, making the identical change in the divisor which was sought to be made in the provision that was stricken out of the bill before it was passed. The passage of this act confirms the argument, above submitted, that Congress had fixed by law (ever since the act

of March 3, 1873) "the price" to be paid for railway mail service by fixing both the rates and the basis upon which they should be computed, so that it could thereafter regulate such pay simply by increasing or reducing the rates a certain per centum. It goes without saying, that the provision to change the divisor by increasing the number of days from ninety to one hundred and five, and which was stricken out of the bill, had for its object a reduction of the pay for performing railway mail service. If Congress had seen fit to reduce the railway mail pay by making this change in the divisor it could have done so, but it adopted the other and simpler method of merely reducing the rates. Surely, it cannot be seriously argued, much less maintained, that although Congress deliberately struck out of the bill, by which it reduced the railway mail pay, a provision to change the divisor, it yet meant thereafter to leave it to the discretion of the Postmaster General to make a further reduction of such pay by increasing the divisor to the same extent and in the same manner that it had refused to do in said bill. It must be presumed that Congress reduced the pay for transporting the mails as much as it thought was right and just to the mail-carrying railroad companies, for it might have increased the percentage of reduction had it thought proper to do so.

By the changes in the rates applying to weights

above 5,000 pounds per day Congress reduced the revenue of mail-carrying roads $3,482,147.76 per annum, and it declared or decided that another large reduction, by changing the divisor, should not be superadded, notwithstanding which the Postmaster General undertakes to do by regulation the very thing Congress declined to do, and by Order 412 to make an additional reduction of nearly $5,000,000 per annum.

Congressional Record, Vol. 42, Pt. 3, p. 2777.
Report 2d Asst. P. M. G. 1908, p. 9.
" " " " 1909, p. 8 and 9.
" " " " 1910, p. 9.
Hearings before Senate Committee on Post Offices and Post Roads, 63d Congress, 2d session, on H. R. 17042 and S. B. 6405, pages 46 and 47.

The cardinal rule in the interpretation of a statute is to determine the intention of the legislative body; all other canons of interpretation being but details of that.

Now upon consideration of the Congressional proceedings of 1907 to which we have referred, it will appear that these questions, and these only, so far as relates in any way to the divisor of mail weights, were before Congress.

(1) Did the existing divisor of weights do justice?

(2) Regardless of the comparative justice in theory of the existing divisor and of that which it was proposed to substitute, was the expedient method in reducing mail pay (*a*) to establish a new divisor or (*b*) to cut down, by percentage, the rates of pay which should apply to the computed weights. If these may be said to be distinct enquiries, they still were enquiries that led to the same action as regards the divisor, to-wit, the forbidding of any departure from the existing divisor and a declared reduction in pay by change of percentage.

The Court of Claims in the Alton case suggested that courts are governed by one rule in cases of actual legislation and another rule in cases of refusal to legislate. The matter presented in United States *vs.* Alexander, 12 Wall., 177, was a refusal to legislate. There is to be considered in the present case, however, not merely the reason for the refusal of Congress to establish a new divisor, but the reason of Congress in establishing new and reduced rates of pay and the reason and purpose were the same for the legislation here as for the non-legislation there.

The dominant fact is that Congress desired and enacted that whatever may have been the merits or demerits of the existing divisor with reference to conditions of days gone by, that divisor and none other should be employed in the future, and

pay should be reduced by a different method which was adopted.

We repeat that the objective of the legislation of 1907 was (1) to make reasonable and just reductions in pay for large mails, and (2) to make no reduction whatever with respect to small mails.

These ends could not be served by changing the method of computing the weights. There was no foreseeing the amount of the reduction which would be effected by a new divisor and a change in the divisor would affect the pay of all routes whether carrying large or small weights.

The matter with which this Court is concerned is not in any strict sense the interpretation of an ambiguous statute. On the face of the Act of 1907 there can be no possible doubt that the purpose of Congress was to reduce the pay of some (not all) mail routes by changing the rates which should apply and not in any other way, nor to reduce the pay at all of the smaller weight routes.

It will be observed that the act of March 2, 1907, does not authorize or direct the Postmaster General to readjust the compensation in any particular whatever, except "on railroad routes carrying their whole length an average weight of mails per day of five thousand pounds." It will be seen at once, therefore, that on all railroad routes carrying an average daily weight of mails of only five thousand pounds, or less, the compensation must

necessarily be determined according to the rates, and the basis of pay, as fixed by the preceding statutes; and any argument in favor of the validity of said orders Nos. 165 and 412, under the act of March 2, 1907, is obliged to assume that Congress intended to allow the basis of pay (which had prevailed since the year 1867) to remain fixed by law upon this latter class of railroad mail routes, and at the same time give to the Postmaster General the discretionary power to change the basis of pay upon the former class, thus making it possible for the Postmaster General to establish a basis of pay for the former class of railroad routes different from that established by law for the latter class. Such an intention on the part of Congress could never be seriously contended for, and so the Postmaster General, in issuing and enforcing orders Nos. 165 and 412, made no distinction between these two classes of railroad mail routes, but had them applied to all alike. It cannot be doubted that Congress, in passing the act of March 2, 1907, did not, and never intended to, give to the Postmaster General any authority or discretion to make any change in the method of ascertaining the average daily weight as a basis of pay, but that it merely changed the rates on certain routes, according to the average daily weight, to be ascertained just as it had been ever since the year 1867.

It will be observed further that this act does not

state that the rates, under the conditions named, "shall not exceed" a certain amount, but expressly provides that they "shall be" as therein set forth. It cannot be maintained that Congress meant to fix by law the rates to be paid on those railroad routes carrying their whole length an average daily weight of mails of more than five thousand pounds, and not likewise fix the rates to be paid on those routes carrying their whole length a smaller average daily weight. It is assumed that, since the passage of the act of March 2, 1907, it will not be contended that the Postmaster General has any authority to change the rates, but that the validity of said orders Nos. 165 and 412, depends solely upon the alleged authority of that official to change the basis of pay by changing the divisor. Congress, at the time it passed this act, had in mind the method of ascertaining the average daily weight which had prevailed since the year 1867 (a period of forty years), and intended the readjustment of the railway mail pay to be made on that same basis.

We have endeavored thus far to demonstrate that the Postmaster General as early as 1867 fixed upon the method of paying railroads for transporting the mails, and established the practice of paying the maximum amount for a service of six round trips per week, which service was at that time made uniformly applicable to all railroads and which service continues to this day. He

further adjusted the pay by ascertaining the daily average weight of mail, necessarily using the common divisor six in dividing the aggregate weight.

This practice the Postmaster General suggested and recommended be carried into law, which was done in the act of 1873, and that practice was uniformly sustained and adhered to in all subsequent legislation and by every administrative officer until the issuance of Order 412.

We think the demonstration sufficient to sustain our contention that Congress fixed the price to be paid this company, and it was beyond the power of the Postmaster General by Order 412 or otherwise to change the same.

By the legislation of 1876, 1878, 1905, and 1907, successively modifying in other parts the act of March 3, 1873, Congress adopted as a fixed feature of the law the method of computing weights that in said law and in the administration thereof had been uniformly practiced by the Department. When in performing the functions imposed upon them by the statute administrative officers have carefully pursued one practice during the more than forty years, and in that period there has been additional legislation at intervals of three, five, thirty-two and thirty-four years on the same general subject, but without mention of that particular function, that practice is adopted and incorporated into the legislation.

In St. Louis, Iron Mountain and Southern Railway Co. *vs.* Craft, 237 U. S., 548, Mr. Justice Vandevanter, in speaking for the court, said at pages 660-661:

> "Following these decisions the amend-
> "ment embodying the new section was pro-
> "posed in Congress. In reporting upon it
> "the Committees on the Judiciary in the
> "Senate and House of Representatives re-
> "ferred at length to the opinions delivered
> "in the two cases, to the absence from the
> "original act of a provision for a survival
> "of the employee's right of action and to the
> "presence of such a provision in the statutes
> "of many of the States, and then recom-
> "mended the adoption of the amendment,
> "saying that the act should be made 'as
> "broad, as comprehensive, and as inclusive
> "in its terms as any of the similar remedial
> "statutes existing in any of the States, which
> "are suspended in their operation by force
> "of the Federal legislation upon the sub-
> "ject.' Senate Report No. 432, 61st Cong.,
> "2d Sess., pp. 12–15; House Report No. 513,
> "61st Cong., 2d Sess., pp. 3–6. While these
> "reports cannot be taken as giving to the
> "new section a meaning not fairly within its
> "words, they persuasively show that it
> "should not be narrowly or restrictively in-
> "terpreted."

In the United States *vs.* Delaware and Hudson Co., 213 U. S., 366, at page 414, the court said:

"Certain it is, however, that in the legis-
"lative progress of the clause in the Senate,
"where the clause originated, an amendment
"in specific terms, causing the clause to em-
"brace stock ownership, was rejected, and
"immediately upon such rejection an
"amendment, expressly declaring that inter-
"est, direct or indirect, was intended, among
"other things, to embrace the prohibition of
"carrying a commodity manufactured,
"mined, produced, or owned by a corpora-
"tion in which a railroad company was in-
"terested as a stockholder, was also rejected.
"1906, 40 Cong. Rec., Pt. 7, pp. 7012-7014.
"And the considerations just stated we
"think completely dispose of the contention
"that stock ownership must have been in the
"mind of Congress, and therefore must be
"treated as though embraced within the evil
"intended to be remedied, since it cannot in
"reason be assumed that there is a duty to
"extend the meaning of a statute beyond its
"legal sense upon the theory that a provision
"which was expressly excluded was intended
"to be included. If it be that the mind of
"Congress was fixed on the transportation
"by a carrier of any commodity produced by
"a corporation in which the carrier held
"stock, then we think the failure to provide
"for such a contingency in express language
"gives rise to the implication that it was not
"the purpose to include it."

In the case of United States *vs.* Alexander, 12 Wall., 177, the court, in construing a pension act, said:

"The act of 1855 when first proposed, con-
"tained the following provision 'and the
"pensions granted by this act and those un-
"der the said section of the act of February
"3, 1853, shall commence on the 4th day of
"March, 1848.' This provision was intended
"to change the construction which the Com-
"missioner of Pensions had given to the act
"of 1753 (30 Cong. Globe, 92), but it was
"stricken out, and the statute was enacted
"as it now stands. The intention of Con-
"gress was thus clearly manifested to adopt
"the construction of the act of 1853, which
"had been given to it by the Pension Bureau,
"and we are hardly at liberty to interpret
"it differently."

See also

Valk *vs.* United States, 28 Ct. Cls., 241.
United States *vs.* Falk Bros., 204 U. S., 143.
N. Y., N. H. & Hartford R. R. Co. *vs.* I. C. C., 200 U. S., 361.
Copper Queen Mining Co. *vs.* Arizona, 206 U. S., 474, and
United States *vs.* Hermanis y Compania, 209 U. S., 337.

In sustaining this point predicated thus far upon the plain reading of the law, we are further supported by the application of an elementary principle of statutory construction.

III.

Contemporaneous Construction.

Under our constitutional form of government it is the duty of the executive to execute or carry into effect the will of Congress as expressed in its various acts. It is not the duty, nor within the power of the executive to substitute its own will for that of Congress, nor in executing the duty placed upon them to ignore the purpose Congress had in mind.

If, therefore, Congress has made its intention clear, such intention constitutes the law, and is binding upon the executive and the judiciary.

> "In all such cases it is held that the intent "of the legislature, which is the test, was not "to devolve a mere discretion, but to impose "a positive and absolute duty."
>
> City of Galena vs. Amy, 5 Wall., 705.
> U. S. vs. Thoman, 156 U. S., 353-9.

It has been our effort to show that the intention of Congress with respect to "the price to be paid for transporting the mail" was clearly and unequivocally expressed in the act of 1873, and left no discretion in the Postmaster General to either reduce or increase such price by the manipulation of the average daily weight of mails.

If we have been so unfortunate as to fail in this demonstration, these two elemental principles of

statutory construction, properly applied, bring us to the same result.

When a statute has received a contemporaneous construction by the Department called upon to administer it, and this construction had been continuous for a long time, such construction is treated as read into, and it becomes a part of the statute if not obviously wrong.

In Komanda *vs.* United States, 215 U. S., 392, the court said:

> "Something can be said on both sides of "the question of similarity, and, if the case "turned simply upon that question, it might "be difficult to reach a satisfactory con- "clusion. In such a case the construction "given by the department charged with the "execution of the tariff act is entitled to "great weight. As said by Mr. Justice Mc- "Kenna delivering the opinion of the court "in U. S. *vs.* Cerrecedo Hermanis y Com- "pania, 209 U. S., 337-9: 'We have said "when the meaning of a statute is doubtful, "great weight should be given to the con- "struction placed upon it by the department "charged with its execution (Robertson *vs.* "Downing, 124 U. S., 607; and U. S. *vs.* "Healy, 160 U. S., 136), and we have decided "that the re-enactment by Congress without "change of a statute which had previously "received long continued executive construc- "tion is an adoption by Congress of such "construction (U. S. *vs.* Falk and Bros., "204 U. S., 143-152).'"

In United States *vs.* Falk & Bros., 204 U. S., 143, the court held:

> "The Attorney General having construed "the proviso of paragraph 50 of the act of "1890 as not restricted to the matter which "might precede it, but as of general applica- "tion, and that construction having been "followed by the executive officers charged "with the administration of the law, Con- "gress adopted the construction by the en- "actment of paragraph 33 of the act of "1897, and intended to make no other change "than to require as the basis of the duty the "weight of the merchandise at the time of "entry, instead of its weight at the time of "its withdrawal."

In the case at bar the construction given to the act of March 3, 1873, and by those charged with its administration has prevailed ever since its passage. At the time the Postmaster General contemplated issuing Order No. 44, departing from that construction, the Attorney General of the United States in a written opinion advised him that the construction on which the postal authorities had been and were acting was correct, and that any departure from that construction would defeat the intention of the law (18 Atty. Gen. Op., 71).

In the case of Allen *vs.* United States, 26 Ct. Cls., 455, the court said:

> "While the doctrine of estoppel might not "apply in this case as it did in the Hartson

"case (25 Ct. Cls., 451), the construction of "a statute by the officers of a department "intrusted with its execution and applica- "tion, and upon the faith of which em- "ployees and officers of the Government "have acted, is entitled to great weight and "consideration when such statute becomes "the subject of judicial construction.

" 'The construction given to a statute by "those charged with the duty of executing "it is always entitled to the most respectful "consideration, and ought not to be over- "ruled without cogent reasons. (Edwards "*vs.* Darby, 12 Wheat., 210; United States "*vs.* the State Bank of North Carolina, 6 "Pet., 29; United States *vs.* MacDaniel, 7 "Pet., 1.) The officers concerned are usually "able men and masters of the subject. Not "infrequently they are the draftsmen of the "laws they are afterwards called upon to in- "terpret (95 U. S., 763).

" 'The same principle was decided in this "court in Hahn's case (14 C. Cls., 305), and "affirmed by the Supreme Court (107 U. S., "402). Also in Alexander's case (12 Wall., "177, and 7 C. Cls., 205); Wright's case (15 "C. Cls., 87); Brown's case (18 Ct. Cls., "537), affirmed by the Supreme Court (113 "U. S., 568), and Harrison's case (20 Ct. "Cls., 122, and 21 Ct. Cls., 16).' "

In the case of Sells *vs.* United States, 36 Ct. Cls., 99, Mr. Chief Justice Peelle in delivering the opinion of the court said:

> "If we were free to consider the construc-
> "tion of the statute, untrammeled by the
> "long and uniform ruling of the depart-
> "ment, we might reach a different con-
> "clusion, but the contemporaneous construc-
> "tion of the statute by those charged with
> "its execution, especially when it has long
> "prevailed, is entitled to great weight, and
> "should not be disregarded or overturned
> "except for cogent reasons, and unless it is
> "clear that such construction was erro-
> "neous" (citing several authorities).

In the case of New York, New Haven and Hartford Railroad Co. *vs.* Interstate Commerce Commission, 200 U. S., 361, at page 525, the court said while construing a statute which had theretofore been construed and acted upon by the Commission:

> "Now, without at all intimating that, as
> "an original question, we would concur in
> "the view expressed in the case last cited,
> "that to have applied the Act to Regulate
> "Commerce, under proper rules and regula-
> "tions for the segregation of the business of
> "producing, selling and transporting, as
> "presented in the Haddock and Coxe Bros.
> "cases, would have been confiscatory, and
> "without reviewing the rulings made by the
> "Interstate Commerce Commission, in those
> "cases, and adhered to by that body during
> "the many years which have followed those
> "decisions, we concede that the interpreta-
> "tion given by the Commission in those cases
> "to the Act to Regulate Commerce is now

"binding, and, as restricted to the precise "conditions which were passed on in the "cases referred to, must be applied to all "strictly identical cases in the future; at "least, until Congress has legislated on the "subject. We make this concession because "we think we are constrained to do so, in "consequence of the familiar rule that a "construction made by the body charged "with the enforcement of a statute, which "construction has long obtained in practical "execution, and has been impliedly sanc- "tioned by the re-enactment of the statute "without alteration in the particulars con- "strued, when not plainly erroneous, must "be treated as read into the statute."

In case of United States *vs.* Alabama Great Southern R. R. Co., 140 U. S., 621, the Court said:

"We think the contemporaneous construc- "tion thus given by the Executive Depart- "ment of the Government, and continued "for nine years through six different ad- "ministrations of that Department—a con- "struction which, though inconsistent with "the literalism of the act, certainly consorts "with the equities of the case—should be "considered as decisive in this suit."

In United States *vs.* Hammers, 221 U. S., 220–228, the Court ruled:

"Conceding then that the statute is am- "biguous, we must turn as a help to its mean- "ing, indeed in such case, as determining its

"meaning, to the practice of the officers "whose duty it was to construe and adminis- "ter it. They may have been consulted as to "its provisions, may have suggested them, "indeed have written them. At any rate "their practice, almost coincident with its "enactment, and the rights which have been "acquired under the practice, make it de- "terminately persuasive."

In United States *vs.* Midwest Oil Co., 236 U. S., 459–472, the Court said:

"2. It may be argued that while these "facts and rulings prove a usage they do not "establish its validity. But Government is "a practical affair intended for practical "men. Both officers, law-makers and citi- "zens naturally adjust themselves to any "long-continued action of the Executive De- "partment—on the presumption that un- "authorized acts would not have been al- "lowed to be so often repeated as to crystal- "lize into a regular practice. That pre- "sumption is not reasoning in a circle but "the basis of a wise and quieting rule that "in determining the meaning of a statute or "the existence of a power, weight should be "given to the usage itself—even when the "validity of the practice is the subject of "investigation.

"This principle, recognized in every juris- "diction, was first applied by this Court in "the often cited case of Stuart *vs.* Laird, "1 Cranch, 299, 309. There, answering the "objection that the act of 1789 was uncon- "stitutional in so far as it gives circuit pow-

"ers to judges of the Supreme Court, it was "said (1803) that, 'practice and acquiescence "under it for a period of several years, com- "mencing with the organization of the ju- "dicial system, afford an irresistible an- "swer, and has indeed fixed the construction. "It is a contemporary interpretation of the "most forcible nature. This practical ex- "position is too strong and obstinate to be "shaken or controlled.'

"Again in McPherson *vs.* Blacker, 146 U. "S., 1 (4), where the question was as to the "validity of a State law providing for the "appointment of presidential electors, it "was held that, if the terms of the provision "of the Constitution of the United States "left the question of the power in doubt, the "'contemporaneous and continuous subse- "quent practical construction would be "treated as decisive.' (36) Fairbank *vs.* "United States, 181 U. S., 307; Cooley *vs.* "Board of Wardens, 12 How., 315: The "*Laura*, 114 U. S., 415. See, also, Grisar *vs.* "McDowell, 6 Wall., 364, 381, where, in 1867, "the practice of the Executive Department "was referred to as evidence of the validity "of these orders making reservation of pub- "lic land, even when the practice was by no "means so general and extensive as it has "since become."

These familiar and controlling decisions were not intended as disposing only of the immediate cases under consideration, but evidence a plainly stated and well-established principle of statutory construction. Their effect cannot be avoided by any

suggestion that the law is of doubtful meaning. It has no doubtful meaning if given the construction plainly expressed and immediately enforced by the executive of an established six-day divisor. It only becomes doubtful through the insistence of the Postmaster General to change the practice and system in force for forty years. The most that can be reasonably claimed through such an effort is to make what was always understood as clear, doubtful and uncertain, and in that case the above-cited opinions clearly and unequivocally establish the practice to be followed by this Court.

As stated by Mr. Justice Barney in stating the opinion of this court in the Chicago and Alton Mail divisor case:

> "If there ever was a case of long-con-
> "tinued construction given an ambiguous
> "statute (if such it may be called) both by
> "Congress and the Department whose duty
> "it was to administer it, this is one. The
> "question has therefore advanced beyond
> "the stage of an original one, and not being
> "clearly erroneous must be upheld."

If there remain any room to doubt whether Congress in enacting the proviso intended to convey any different meaning than that for which we here contend, we may then rely, as squarely supporting our contention, upon those well-recognized sources of information which may also be resorted

to for the purpose of discovering the meaning in cases where the language of the statute admits of more than one construction, namely:

The debates in Congress and the various amendments proposed during the progress thereof to the bill as originally introduced as a means of ascertaining the history of the period, the surrounding circumstances, and the defects which it was the object of the law to remedy;

The practical contemporaneous executive construction placed upon the language of the proviso by the administrative body to which the execution and enforcement of the act was expressly delegated, and long relied and acted upon by those for whose guidance it was promulgated;

The acquiescence of Congress in, and its acceptance of, the only executive construction of the proviso ever communicated to it.

The absence of any authoritative judicial construction whereby Congress could have been influenced; and,

The adoption by Congress of the construction placed upon the proviso by re-enacting without change the exact words of the statute which had previously received a long continued executive construction, and which had not received any authoritative judicial construction.

If notwithstanding the above stipulated definitions there still remains any doubt as to the meaning of the proviso, then, as this Court, through Mr. Justice Brewer, said in Smith *vs.* Townsend, 148 U. S., 390 (494); 37 L. Ed., 534:

> "It is well settled that where the language "of a statute is in any manner ambiguous, "or the meaning doubtful, resort may be had "to the surrounding circumstances, the history of the times, and the defect or mischief "which the statute was intended to remedy."

The rule that congressional debates may not be used as a means to an interpretation of an act of Congress is not violated by referring thereto for the purpose when the statute was adopted or as a means of determining conditions which the statute was designed to remedy, for, as was said in this Court in Standard Oil Company *vs.* United States, 221 U. S., I (50); 55 L. Ed., 619, (641):

> "Although debates may not be used as a "means for interpreting a statute * * * "that rule, in the nature of things, is not "violated by resorting to debates as a means "of ascertaining the environment at the time "of the enactment of a particular law; that "is the history of the period when it was "adopted."

The rule announced in Heath *vs.* Wallace, 138 U. S., 573; 34 L. Ed., 1068, and followed by a long line of cases decided by this Court, provides:

"Moreover, if the question be considered "in a somewhat different light, viz., as the "contemporaneous construction of a statute "by those officers of the Government whose "duty it is to administer it, then the case "would seem to be brought within the rule "announced at a very early day in this Court "and reiterated in a very large number of "cases, that the construction given to a stat- "ute by those charged with the execution of "it is always entitled to the most respectful "consideration and ought not to be over- "ruled without cogent reasons."

The rule thus announced is reiterated in numerous cases, including:

Pennoyer *vs.* McConnoughy, 140 U. S., 125;
Brown *vs.* United States, 113 U. S., 568, 574;
U. S. *vs.* Moore, 95 U. S., 760;
U. S. *vs.* Ala. R. R. Co., 142 U. S., 616;
U. S. *vs.* Corecede, 209 U. S., 377.

In Pennoyer *vs.* McConnoughy, *supra,* the Court said:

"The principle that a contemporaneous "construction of a statute by the executive "officers of the Government, whose duty it is "to execute it, is entitled to great respect and "should ordinarily control the construction "of the statute by the courts, is so firmly im- "bedded in our jurisprudence that no author- "ities need be cited to support it. On the "faith of a construction thus adopted, rights "of property grow up, which ought not to

"be ruthlessly swept aside, unless some great "public measure, benefit or right is involved, "or unless the construction itself is mani- "festly incorrect."

In United States *vs.* Moore, *supra,* this Court said:

"The construction given to a statute by "those charged with the duty of executing "it, is always entitled to the most respectful "consideration and ought not to be overruled "without cogent reasons (citing Edwards "*vs.* Darby, 12 Wheat., 210; U. S. *vs.* Bank, "6 Pet., 29; U. S. *vs.* McDaniel, 7 Pet.). The "officers concerned are usually able men, "and masters of the subject. Not infre- "quently they are the draftsmen of the laws "they are afterwards called upon to inter- "pret."

In this case the membership of the commission was composed in part of eminent lawyers.

In United States *vs.* Finnell, 185 U. S., 236; 46 L. Ed., 890, this Court, at page 244, said:

"Of course, if the departmental construc- "tion of the statute in question were ob- "viously or clearly wrong, it would be the "duty of the Court to so adjudge. * * * "But if there simply be a doubt as to the "soundness of that construction—and that "is the utmost that can be asserted by the "Government — the action during many "years of the department charged with the "execution of the statute should be re- "spected, and not overruled except for co-

"gent reasons. * * * Congress can en-
"act such legislation as may be necessary to
"change the existing practice, if it deems
"that course conducive to the public in-
"terest."

In United States *vs.* Johnson, 124 U. S., 236; 31 L. Ed., 389, it is said:

"In view of the foregoing facts the case
"comes fairly within the rule, often an-
"nounced by this Court, that the contempo-
"raneous construction of a statute by those
"charged with its execution, especially when
"it has long prevailed, is entitled to great
"weight and should not be disregarded or
"overturned except for cogent reasons, and
"unless it be clear that such construction is
"erroneous."

To the same effect is Brown *vs.* United States, 113 U. S., 568; 28 L. Ed., 1080, wherein it is declared:

"It must be conceded that were the ques-
"tion a new one, the true construction of
"the section would be open to doubt. But
"the findings of the Court of Claims show
"that soon after the passage of the act the
"President and the Navy Department con-
"strued the section to include warrant as
"well as commissioned officers, and that they
"have since that time uniformly adhered to
"that construction, and that under its pro-
"visions large numbers of warrant officers
"have been retired. This contemporaneous

"and uniform interpretation is entitled to
"weight in the construction of the law, and
"in a case of doubt ought to turn the scale.
"In Edwards vs. Darby, 12 Wheat., 206, it
"was said by this Court that, 'in the con-
"struction of a doubtful and ambiguous law
"the contemporaneous construction of those
"who were called upon to act under the law,
"and were appointed to carry its provisions
"into effect, is entitled to great respect.'
"This case is cited upon this point with ap-
"proval in Atkins vs. Disintegrating Co., 18
"Wall., 301; 21 Law. Ed., 84; Smythe vs.
"Fiske, 23 Wall., 382; 23 Law. Ed., 49;
"U. S. vs. Pugh, 99 U. S., 265; 25 Law. Ed.,
"322, and in U. S. vs. Moore, 95 U. S., 763;
"25 Law. Ed., 589. In the case last men-
"tioned the Court said that 'the construction
"given to a statute by those charged with the
"duty of executing it ought not to be over-
"ruled without cogent reasons. The officers
"concerned are usually able men and mas-
"ters of the subject. Not infrequently they
"are the draftsmen of the laws they are
"afterwards called upon to interpret.' And
"in the case of U. S. vs. Pugh the Court said:
"'While, therefore, the question, "the con-
"struction of the abandoned property act,"
"is one by no means free from doubt, we are
"not inclined to interfere at this date with
"a rule which has been acted upon by the
"Court of Claims and the executives for so
"long a time' (citing cases). These author-
"ities justify us in adhering to the construc-
"tion of the law adopted by the Executive
"Department of the Government and are con-
"clusive against the contention of appellant

"that section 23 did not apply to warrant "officers."

That the position of counsel may not be misapprehended or misunderstood, we are not before this Court to contend for a moment that the judicial power does not extend to a sweeping obliteration of any contemporaneous or executive construction of a statute, or any part thereof. And the fact that such construction may have received the sanction of ages would not of itself defeat or lessen the dominion of courts over the interpretation and construction of statutes. That is a function, a prerogative, a power so inherent that it cannot be questioned. It is this very power which in time of stress not only gives protection to the citizen and subject, but also stability to the State.

Whether the construction of the proviso in question was in accord with the literalism thereof is not so much the question with us as is the fact that such views were contemporaneously pronounced by the body of experienced men to whom was committed the power to execute the law. If the advice and opinions of such men were not intended to be of primesf importance and significance to all those subject to the operation of the law, then it is to be said that the Congress made a mistake in committing to them an authority so comprehensive and so vast.

Congress not only by refraining from amending

the act, but also by re-enacting the proviso without change, accepted a construction of the act with which it is impossible to reconcile the judgment under review, and which construction by the body possessed of full executive functions over the act became virtually the law of the land, and, until the institution of this suit, stood as a guide and protection to all persons embraced by the act.

We respectfully submit that we have thus far demonstrated:

1. The executive practice before 1873 of paying maximum compensation for a service of six round trips per week and establishing six round trips as the uniform contract service.

2. The similar practice prior to 1873 of weighing the mails and dividing the aggregate weights by a multiple of six.

3. Originally in 1873 adopting as law such uniform practice.

4. Legislation in 1875, 1876, 1878, 1905, and 1907 re-enacting the provisions of the act of 1873 with full knowledge of the executive practice thereunder.

5. Statutory construction making such executive practice the law.

We have, therefore, settled the question that this

claimant having agreed and contracted to carry the mail at such prices as Congress might fix, and Congress having fixed the same, it was, and still is, beyond the power of the Postmaster General to change it.

IV.

The Contract under the Distance Circular.

The distance circular sent the company February 12, 1907, which it was requested to fill out, execute, and return, contained an agreement clause reading:

> "The company named below agrees to "accept and perform mail service upon the "conditions prescribed by law and the regu- "lations of the department applicable to "railroad mail service."

Accompanying this distance circular was a notice that the mails would be weighed on said routes, commencing February 19, 1907,

> "for the purpose of obtaining data upon "which the Department may adjust the pay "for mail service on the route (in accord- "ance with the several acts of Congress "governing the same), from July 1, 1907," etc.

The above facts are set forth in finding XI of the Court of Claims, and it is therein further shown that in returning said distance circulars

duly executed, the company advised the Postmaster General that service was not accepted if Order 412 was to be enforced. The letter of protest read in part:

> "The contract in question obligates our "company 'to accept and perform mail serv- "'ice upon the conditions prescribed by law "'and the regulations of the department ap- "'plicable to railroad mail pay,' and we "therefore beg leave to now formally advise "in submitting these distance circulars, that "the service involved is accepted, and our "company agrees to perform same with the "proviso that by thus subscribing and de- "livering these circulars to the Department "our company does not agree to submit to "any but lawful regulations by the depart- "ment and on this point our company does "not concede the power of the Postmaster "General, through an order or through any "other act of the Post Office Department to "provide for changing the method of ascer- "taining the daily average weight of mails "carried over the routes named on the dis- "tance circulars herewith, unless authorized "by proper congressional enactment. In "the view of our company there is no au- "thority whatever in existing legislation for "the aforesaid Orders 165 and 412, issued "March 2, 1907, and June 7, 1907, respect- "ively.
>
> "The mails will be transported by our "company, of course, as required by public "necessity, pending settlement of the rights "of our company and of the United States

"in the question involved—*i. e.,* the matter
"of ascertaining the average daily weights,
"with the consequent annual compensation
"for service performed over the routes
"covered by the distance circulars herewith.
"In addition to thus assuring the transpor-
"tation of the mails as heretofore, by way
"of adequately fulfilling the public necessi-
"ties, we now record our company's formal
"refusal to accept the proposed method of
"ascertaining the average daily weight of
"mails carried, and fixing the annual rates
"of pay as provided by the orders of the
"Postmaster General heretofore described,
"and our company also reserves all of its
"rights in the premises to hereafter take
"such action as may be found requisite to-
"ward determining the legal method of as-
"certaining the daily average weight of mail
"carried over each route and the correct
"and legal rates of compensation for the
"services so rendered, in accord with the ex-
"isting legislation which controls the mat-
"ters involved."

To this very precise and definite statement the Second Assistant Postmaster General replied:

"I have to advise you that the Depart-
"ment will not enter into contract with any
"railroad company by which it may be ex-
"cepted from the operation or effect of any
"postal law or regulation, and it must be
"understood that in the performance of
"service, from the beginning of the contract
"term above named, and during the con-

"tinuance of such performance of service, "your company will be subject, as in the "past, to all the postal laws and regulations "which are now or may be applicable during "the term of this service."

This correspondence shows that upon one point and one point only did the minds of the contracting parties fail to meet. Both agreed that the mails should be carried for four years in accordance with the law and the regulations of the department applicable to railroad mail service, but whilst the Postmaster General contended that Order 412 was in accord with law, the company insisted it was not and claimed the right to test that question in court.

The entire question therefore reverts to the original proposition—Was Order 412 lawful and within the power of the Postmaster General to enforce?

In the first place, it may be said that the expression "regulations of the Department" means "lawful regulations," for an order or regulation which is contrary to law is null and void *ab initio.*

Morrell, *vs.* Jones, 106 U. S., 466.
United States *vs.* Eaton, 144 U. S., 677.
United States *vs.* Williamson, 207 U. S., 425.

The "conditions prescribed by law" constitute a part of the contractual relations between the

United States and the company and it is not necessary to consider all the conditions prescribed by law, but only such as Order 412 is in conflict with.

This order dealt entirely and solely with the method of ascertaining the average weight of mail. It had nothing to do with the maximum or minimum rate of pay. In order therefore to test its legality we cannot look to any discretion which may or may not be lodged in the Postmaster General as to the rate of pay, but must be guided entirely by the statutory method of fixing and ascertaining the average weight of mail. That method has been so fully argued hereinabove as not to require elaboration here.

It is sufficient to say that the terms under which service was to be performed were to apply, according to the Postmaster General,

"from the beginning of the contract term."

It follows that the Postmaster General meant and intended the company to understand that there was a contract in existence and that it must be carried out in conformity with the law. If the law fixed the divisor, then the contract contemplated such a division. If the law did not fix the divisor, and it was subject to change from time to time by order or regulation, then the divisor fixed by the order must be used. There was, then, a contract agreed to by both parties and the only question is

whether the law or the order fixed the divisor. If fixed by order there is an end of appellant's case so far as this phase is concerned, but if fixed by law, then the mail has been carried according to law and the lawful regulations, as the contract provided, and that is determinative of the case in appellant's favor.

Having, as we believe, already established that the divisor was fixed by law prior to the issuance of Order 412, it naturally follows that the order is null and void and should be set aside.

V.

The Implied Contract.

Should it be held, however, that the minds of the contracting parties did not meet, sufficiently to justify a holding that the distance circulars, signed in 1907, in connection with the subsequent communications, constituted a binding contract, it will then be necessary to find the true terms and conditions under which the service was rendered.

In the absence of some express agreement the Postmaster General has since 1867 held himself obligated to pay the maximum rate fixed by law for the minimum service of six round trips per week.

One fact stands out pre-eminent, to wit: there was never any agreement or understanding that the pay was to be governed by Order 412.

Neither can it be said there was any bargaining about the amount of compensation to be paid. It was recognized that the law, properly interpreted, fixed that. The situation is therefore precisely similar to that considered by this court in Chicago, Milwaukee & St. Paul Ry. Co. *vs.* United States (104 U. S., 680-687).

> "Of course if it was not the intention of "the acts of Congress referred to, to affect "the contracts of the company, the erroneous "interpretation of them by the Postmaster "General, and his action under it, cannot "give to them any different effect, *for the "rights of the parties depend upon the law "itself.* And the performance by the com- "pany of the service required by its contract, "notwithstanding the notice of the intended "reduction of compensation by the Post- "master General, cannot be construed as a "waiver of its rights or an acquiescence in "new proposals and that whether it had pro- "tested against the erroneous construction "of the law or not. For it had no option. "It was bound by its contract to perform "the service, and its performance was de- "manded. It was not in a position abso- "lutely to refuse to carry the mails, for it "was bound to carry them, if offered, on "some terms, *either prescribed by law or "fixed by contract*, and it had the right to do "so, without prejudice to its lawful claims, "leaving the ultimate right to future and "final decision. It was not the case of a "voluntary payment of an illegal exaction, "where the maxim, *consensus tollet er-*

> "*rorem*, prevents a recovery, because in such "case, there is the legal presumption of an "abandonment of the claims. *Volenti non* "*fit injuria*. But here the service was to be "performed, at all events, just as it was per- "formed, but under which of two claims was "under dispute. Its performance was a "condition of both, and cannot, therefore, "be a bar to either."

It is equally true in this case that the service was to be performed, but under which of two claims, regarding compensation due, was in dispute. Here, as in the case cited, performance was a condition of both claims for compensation.

There is no dispute but that it was entirely competent for the Postmaster General to contract at rates less than the statutory maxima. But this case shows a specific offer upon the part of the Postmaster General to pay the maximum rates provided by law, an expressed willingness of the company to perform service at such rates and a continuing uninterrupted practice from 1873 to date to pay such maximum rates for the fixed service of six round trips per week.

Under such circumstances the United States became obligated to pay what the service was reasonably worth, and the statutes hereinbefore referred to and the uniform practice of the Department for over forty years in applying them to furnish the necessary guide for a determination as to that fact.

The language of the law fixes what reasonable compensation is, and such compensation must control unless the Postmaster General is able, by specific contracts, to procure service for a lesser sum. For many years prior to 1907, this company had been rendering the identical service called for in this case and had been paid upon the basis of rates specified in the law which, as said in Eastern R. R. Co., 20 Ct. of Cl., 23.

> "whilst they did not establish an absolute
> "rate of compensation necessarily alike to
> "all railroads, for mail transportation, fixes
> "the maximums which are not to be ex-
> "ceeded, leaving the Postmaster General a
> "discretion to make contracts at less rates if
> "he should be able to do so. * * * The
> "implied compensation was the reasonable
> "worth of the service, *and that might be*
> "*measured by the previous dealings of the*
> "*parties for like service in the statutes*
> "*regulating the same. The maximum rate*
> "*fixed by statute would no doubt be consid-*
> "*ered the reasonable and implied compensa-*
> "*tion until the Postmaster General should*
> "*make other terms, with the concurrence,*
> "*express or implied, of the claimant.*"

It was further held in Jacksonville, Pensacola & Mobile Co. *vs.* United States (118 U. S., 626):

Where companies

> "perform service without express contract,
> "their compensation depends wholly upon
> "implied contracts to be inferred from and

> "interpreted by the general laws of Con-
> "gress, and the regulations, orders and prac-
> "tices of the Post Office Department and
> "other attending circumstances as in the
> "Eastern R. R. case, before cited."

Lord Watson, in Manchester, Sheffield, & C., Ry. *vs.* Brown, L. R. 8, Appeal Cases, 715, said:

> "*Prima facie* I am prepared to hold that
> "a rate sanctioned by the legislature must
> "be taken to be a reasonable rate."

In Great Western Ry. Co. *vs.* McCarthy, L. R. 12, Appeal Cases, 218-235, it was said:

> "A rate sanctioned by Act of Parliament
> "is a legal rate, which the company can
> "exact from all who employ them to carry,
> "unless they have disabled themselves from
> "making the change by conceding terms un-
> "duly favorable to some of their customers.
> "Until it is shown that they cannot law-
> "fully charge the statutory rate, it must, in
> "my opinion, be regarded not only as law-
> "ful, but as reasonable."

See also

> Jenkins *vs.* Nat'l Asso'n, 111 Georgia, 734.
> Thompson *vs.* Sanborn, 52 Michigan, 141.

To this we must add the uninterrupted practice of our forty years, and still continued by the Departments administering the postal laws, of

always, in the absense of some express agreement to the contrary, paying the maximum rate fixed by law. This must evidence its reasonableness, not only because Congress has changed it from time to time to meet changed conditions, but also because it will not be presumed that every Postmaster General from 1867 to the present time has been paying an unlawful or unreasonably high rate for carrying the mail.

Finding IV (Record, p. 33) specifically finds:

> "From and after 1873 and until Order "412 became effective, it was the practice of "the Postmaster General, when computing "the compensation payable to railroad car- "riers for service to be performed in trans- "porting the mails over the several routes, "to apply to the quotient obtained as above "set forth, or by the act of 1905, which in- "creased the minimum weighing days, *the "maximum rate allowed by statute,* except "in cases," etc., not covering any class of service involved in this case.

Finding V also holds (Record, p. 34):

> "In administering the provisions of said "acts of 1876 and 1878, and in making the "reductions therein specified, the Postmas- "ter General *started with the maximum "rates of pay* allowed by the act of 1873, "and the *pro rata maxima* prescribed by the "Department for intermediate weights, "and reduced the rates in accordance with "said acts. The maximum rates taken in

> "connection with the averages found as
> "stated, and the mileage involved, fur-
> "nished the amount of the annual compen-
> "sation."

In an opinion of January 20, 1876, the Assistant Attorney General for the Post Office Department held:

> "When a service is performed in full
> "compliance with the terms and conditions
> "of the act it would entitle the company per-
> "forming it to the maximum rate of com-
> "pensation therein provided; but a service
> "performed meeting partially only the con-
> "ditions and terms of the act would be en-
> "titled only to a rate of compensation pro-
> "portioned to its incomplete character."
> (Opinions, Vol. 1, p. 214.)

Under the authorities quoted and the Findings of the Court, we have as a guide to the fixing of a fair, reasonable and lawful compensation (1), the act of March 3, 1873 "authorizing and directing" the Postmaster General to thereafter pay not to exceed the rates named in the law.

(2) The act of July 12, 1876, authorizing and directing the Postmaster General to readjust the compensation to be paid by reducing the amounts theretofore fixed by law ten per centum.

(3) The act of June 17, 1878, authorizing and

directing the Postmaster General to further reduce the compensation five per centum.

(4) The act of March 2, 1907, authorizing and directing the Postmaster General to reduce the compensation on railroad routes carrying a daily average of 5,000 pounds or more.

(5) The uniform practice of the Postmaster General for over forty years of paying the maximum amount authorized by law for the minimum service of six round trips per week.

Surely under such conditions it is fairly contended that the company is entitled to receive the compensation so fixed by law and uniformly paid for similar service.

VI.

The Application of a Seven-day Divisor to a Six-day Service is Arbitrary, Unjust, and Contrary to Law.

The Postmaster General requests of all companies a six-day service, and on many routes the mail is only carried six days in the week. The entire weighing period is 105 days, during which these six-day routes carry the mail only 90 days. Notwithstanding this fact, under Order 412 the daily average is reached by dividing the total

weight carried by 105 and the absolutely inaccurate and unjust daily average is arrived at in that way. A reading of the acts of 1873 and 1905 will demonstrate that such a method of adjustment was not only never contemplated but never authorized. There is no semblance or pretense of accuracy or fairness in thus arbitrarily stating a false conclusion.

In the previous discussion of this case counsel for the United States have admitted that the meaning of the act of 1873 was not free from doubt; that literally followed it called for a mathematical divisor, but that in the exercise of a broad discretion resting in him the Postmaster General had construed it otherwise and originally adopted the divisor 30. Under Order 412 the Postmaster General not only departs still further from mathematical accuracy, and as applied to over 1,300 mail routes carrying no mail on Sunday, fixes an arbitrary and absurd divisor. If he weighed the mails for 313 days when they were actually carried and divided the total by 313, he would obtain the exact result intended by the law, but to divide the total by 365 is a clear violation of the plain terms of the law. By so doing he charges the six-day routes with carrying the mail on Sunday and punishes them for not doing it, although it is with his consent and agreement that service shall be for only six days a week.

If there were nothing else in this case but the routes carrying mail six days per week, we are sure this Court would not sanction or approve of Order 412, under which the weight of mail carried 90 days is divided by 105 to ascertain the average daily weight. Manifestly it does nothing of the kind and therefore is a plain violation of the law, which intended such daily average to be at least approximately correct and to result in each company receiving, as far as practicable, a proportionate and just rate of compensation, according to the service performed.

VII.

The Discretion of the Postmaster General.

In all the previous discussions of these cases and particularly in the opinions of the Court of Claims, Order 412 has been sustained as the reasonable exercise of a discretionary power resting on the Postmaster General, and it has been seriously and continuously argued, that there is nothing in any of the acts of Congress fixing mail pay to detract from or destroy that discretion.

To all this it is sufficient to say that the Postmaster General has all the discretion he had prior to the act of 1873, but that under no reasonable construction of the law can it be said that his discretion was thereby broadened.

Prior to 1873 the Postmaster General was dealing with a lot of independent companies, who were free to contract for the carrying of the mails upon such terms as might be mutually agreed upon. The Postmaster General could contract with them for compensation within the maximum specified in the law. He can still do that. But after 1873 Congress directed the Postmaster General to rearrange pay, having in the meantime burdened land-grant roads with the agreement to carry the mail at such rates as Congress might prescribe. Whilst, therefore the Postmaster General might then or now contract with those carriers for any amount within the legal maximum, in the absence of such special contract the price fixed by Congress must control.

The Postmaster General has now the same discretionary power he had before 1873 to contract with each company, but a contract to perform service "according to law and the regulations" presupposes a statutory rate which must be paid.

The only difference therefore in the matter of discretion, existing prior to 1873 and since, is that land-grant roads were taken out of the class of carriers who might decline to carry the mails if the terms offered were not satisfactory. As to these and all other carriers the Postmaster General has now, as he had prior to 1873, full discretion to contract for service within the maximum rates fixed by law. The only difference is that should he fail

to make such special separate contracts, then, as to land-grant roads, they must carry the mails "at such prices as Congress may by law provide."

Reference in this particular has been made to the act of July 28, 1916, requiring all railroads to carry the mail, but it is well to note the language of that act, making it unlawful to refuse to perform service

> "at the rates or methods of compensation
> "provided by law."

Conclusion.

As to this company, it was agreed between it and Congress in the act of July 2, 1864, that the company would carry the mails

> "at such prices as Congress may by law pro-
> "vide and until such price is fixed by law the
> "Postmaster General shall have the power
> "to fix the rate of compensation."

Congress has by the acts of 1873, 1876, 1878, and 1907, fixed the price to be paid, and the Postmaster General has not the power to change the same. Excepting as it has placed this company, as a land-grant road, in the class of carriers obligated to carry the mail, Congress has not interfered with the free discretion of the Postmaster General to specially contract with any company within the

legal maximum, but, in the absence of such special contract, the company obligated to and carrying the mail is entitled to the price fixed by law.

Congress has never provided for a Sunday service; the Postmaster General has never contracted for Sunday service; the railroads have never agreed to furnish Sunday service, and six round trips per week have, from 1873 to this day, been considered by all parties as the understood contractual service, entitling the companies, in the absence of an express agreement to the contrary, to the maximum compensation provided by law.

There never have been six-day or seven-day routes. They are all six-day routes because the Department has itself consistently called for six round trips per week. Service on Sunday, therefore, is exactly the same as extra service by several trains a day, purely voluntary, outside the contract or demands of the Department and not to be taken as the means of punishing the carrier through a reduction of pay for such improved and increased service.

If all this can be ignored and the case disposed of under the theory of an unlimited discretion resting in the Postmaster General, then all the extended hearings and reports on railway mail pay and resulting legislation may be ignored as a total waste of time and money, because the Postmaster General is in exactly the same position he was be-

fore they were considered or passed, and can, in the exercise of his discretion, do everything Congress has attempted to do and some things Congress has expressly refused to do.

Respectfully submitted,

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Taking first the group to be readjusted in 1907, on February 12, 1907, the Postmaster General notified appellant that direction had been given to weigh the mails on these routes "for the purpose of obtaining data upon which the department may adjust the pay for mail service * * * from July 1, 1907."

This notice set out that the weighings would be in accordance with Order No. 412, which recited as follows:

> ORDER No. 412.—Ordered that Order No. 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:
>
> "That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

This notice also was accompanied by the usual distance circular, which appellant was requested to fill out with specific information called for, and return to the department. This circular contained what was commonly called the "agreement clause" (also called "acceptance clause"). (Finding XI, R. 40.)

Appellant returned the executed distance circular with the agreement clause signed, but with an "exception" to orders No. 165 and No. 412 attached thereto. Accompanying the distance circular was a letter more specifically objecting to the terms of said orders. The Second Assistant Postmaster General replied by letter to the appellant, stating that, notwithstanding the "exception," the department would not enter into any contract with any railroad com-

pany by which it may be excepted from the operation or effect of any postal law or regulation. The mails were thereafter duly weighed, the computations of the average daily weights completed on the basis of the terms of Order No. 412, and the maximum rates provided by statute applied thereto. Orders were made stating the compensation which would be paid, and notice thereof was given to appellant. (Finding XI, R. 41, 42, 43.)

The appellant carried the mails thereafter, and during the term, without further protest or objection.

When the quadrennial term for this group of routes was about to end on June 30, 1911, the same method was pursued by the department. The distance circular was again sent out with a notice regarding the weighing to secure data for the new term beginning July 1, 1911, and there was inserted in it specific mention of the Postmaster General's Order No. 412. The terms of the order were quoted. On June 27, 1911, the department, not having received back the distance circulars, called appellant's attention thereto and informed it that in the meantime the service would continue, subject, as in the past, to all applicable postal laws and regulations. (Finding XI, R. 43.)

The appellant on July 5, 1911, returned the distance circulars with the agreement clause signed but with the same "exception" to Order No. 412 as in 1907. This exception was also set out in an accompanying letter. To this the Second Assistant Postmaster General replied, on July 12, 1911, in the same

manner as in 1907. To this the appellant replied, on July 24, 1913, to the effect that the signed distance circular constituted a contract with the United States, under which the company may be required to perform service, etc. The Second Assistant Postmaster General replied, on July 26, 1913, that the filing of the distance circular with the agreement above modified did not constitute a contract with the United States and that the department would not enter into any contract by which the railroad company might be exempted from the operation or effect of any postal law or regulation or order of the Postmaster General. In reply to this, appellant wrote the Second Assistant Postmaster General, on July 27, 1913, that, inasmuch as the filing of the distance circular constituted the only contract to which it had assented, it would be pleased to receive advice as to the conditions under which the mail was to be transported during the quadrennial term, stating that the company did not consent to transportation under Order No. 618. On July 28, 1913, the Second Assistant Postmaster General replied to the effect that appellant's objection appeared to be directed against Order No. 618, which had been declared to be legal, had become the uniform practice of the department, and had been applied to all weighings since its promulgation; that the compensation would be thereafter fixed in accordance with the terms of said order, at the maximum allowed by the Postmaster General under the laws and regulations, and that if the company performed the service it would not be paid more than the sum

of compensation named in said adjustment orders. (Finding XI, R. 48, 64, 65.)

Thereafter the mails were duly weighed and the average daily weights were ascertained in accordance with the terms of order No. 618. The maximum rates provided by the statute were applied thereto and the usual orders were made stating the precise sums which would be paid for the service contemplated. Appellant was notified thereof (Finding XI, R. 49), and continued to carry the mails for the quadrennial term and to receive the amounts provided without further objection or protest.

Before the end of this quadrennial term, on June 21, 1915, the Second Assistant Postmaster General, on February 10, 1915, sent the appellant usual distance circulars with the same directions of notice with reference to the weighing of the mails for this same group of routes. On June 21, 1915, appellant returned the distance circulars with the agreement theron signed but with an "exception" to order No. 618, and the statement that the company could not accept as full compensation payments based upon a daily average so computed. To this the Second Assistant Postmaster General, on June 30, 1915, replied in the same terms as in 1911. (Finding XI, R. 49, 65.)

The mails were thereafter weighed, the average daily weights were ascertained in accordance with the terms of order No. 618, the pay was fixed as before and notice was given thereof in the same manner as in 1911. (Finding XI, R. 49.)

Appellant carried the mails and received the compensation as fixed during the quadrennial term without further objection or protest.

With respect to the second group of routes, the first readjustment term under consideration began July 1, 1930. The following negotiations were had:

The Postmaster General, on February 6, 1930, notified appellant that instructions have been given to weigh the mails for the same purposes as stated with reference to the other group of routes. His notice contained the same reference to order No. 622. It was accompanied by the usual form of distance circular. The department not having received back the distance circular on June 24, 1930, notified appellant of that fact and stated that in the meantime the service would continue subject, as in the past, to the postal laws and regulations applicable thereto. (Finding 13, R. 46, 47.)

Thereafter, on July 11, 1930, appellant returned the executed distance circular with the agreement clause signed and exception noted to orders No. 622 and No. 623. They were accompanied by a letter referring to the protest. On July 8, 1930, the Second Assistant Postmaster General replied by letter in the same terms and as to the other group of routes hereinbefore mentioned. Thereafter the mails were weighed, the average daily weight was ascertained in accordance with the terms of order No. 622, the maximum rates of pay were applied thereto, and an order was made fixing specific amounts which would be paid for the service on

completed. Notice thereof was sent to appellant. (Finding XI, R. 47.)

Before the expiration of this term on June 30, 1916, the Second Assistant Postmaster General, on February 9, 1916, sent appellant the same notification and distance circular as before and appellant returned the distance circular with the agreement clause signed but with the same exception. The Second Assistant Postmaster General replied to the protest on July 20, 1916, in the same language as before. Thereafter the mails were weighed, the average daily weights were ascertained in accordance with the terms of Order No. 412, the maximum rates fixed by the statute were applied thereto, and the pay for service was found accordingly and notice thereof was furnished appellant. (Finding XI, R. 47, 48.) Appellant carried the mails and received pay for service in accordance with the terms of said orders during the quadrennial term without further protest or objection.

Appellant filed its original petition in the Court of Claims January 15, 1923 (R. 1-22), and a supplemental petition June 28, 1927 (R. 26, 28). The claim is for the recovery of $610,116.69 as the difference between the pay received and that which might have been allowed had the Postmaster General applied the maximum rates permitted by the statute to an average daily weight computed by using the factors prescribed in Order No. 412.

Appellant has received grants of lands from the United States over portions of its lines over which

mails are carried. (R. 26, 27, 28.) Of the seventy routes served by this appellant and involved in this suit, only five are wholly over land aided lines and eight others are over lines land-aided in part only. Fifty-seven of the routes here involved are over lines no part of which was in any way aided by the United States.

The general facts in this case are otherwise the same as those in the *New York Central case*, No. 133, in which appellee's principal brief has been filed.

The Court of Claims upon the evidence found the facts as stated. (R. 25–30.) It decided as a conclusion of law that the plaintiff was not entitled to recover, and dismissed its petition. (R. 30.)

ARGUMENT.

I.

The facts show that appellant carried the mails under an express contract, and its terms control appellant's rights.

From the foregoing statement it will be observed that so far as the question of protest is concerned the facts in this case differ from those in the case of the New York Central and Hudson River Railroad Company, No. 133, only in the extent to which the correspondence was carried. It will be noted that before the readjustment orders had been made the correspondence expressing those protests had ended, and that thereafter the Postmaster General made the usual orders in accordance with the terms of the statutes and Order No. 413, fixing the pay of appellant, of which due notice was given, and that there-

after appellant carried the mails and received payment therefor without further objection or protest.

The legal status of the appellant, therefore, is substantially the same as in the last above-mentioned case. The terms of the Postmaster General's offer were stated by the readjustment order, of which appellant was duly advised. *The compensation was fixed by him at the maximum rate on the basis that average weights were ascertained as prescribed in Order 412.* The offer was accepted by carrying the mails as tendered thereafter. Under the authorities elsewhere cited, the terms of the contract which existed between the parties were so defined.

If it be held that there was not an actual meeting of minds, they were still the terms on which the service was performed, and measured the right and extent of compensation therefor.

Counsel for the Northern Pacific Co. argue that the relation of the parties was one of express contract. But they misconceive its nature and are so led into fundamental error. They state their contention with respect to the existence of a contract, on page 73 of their brief, as follows:

> It follows that the Postmaster General meant and intended the company to understand that there was a contract in existence and that it must be carried out in conformity with the law. If the law fixed the divisor, then the contract contemplated such a division. If the law did not fix the divisor, and it was subject to change from time to time by order or regulation, then the divisor fixed by the

> order must be used. There was, then, a contract agreed to by both parties and the only question is whether the law or the order fixed the divisor. If fixed by order there is an end of appellant's case so far as this phase is concerned, but if fixed by law, then the mail has been carried according to law and the lawful regulations, as the contract provided, and that is determinative of the case in appellant's favor.

This contention, therefore, is that there was an express contract, but that a term of it was the use of a particular divisor fixed by the law. The fallacy here involved is dealt with by us in the *New York Central Case*, but notice is again given to it here because this appelant reaches its conclusion by an entirely different process of reasoning from that adopted by the other appellants.

This process asumes that the law of 1845 fixed the rate to be paid but did not fix the basis upon which the rate should be computed, leaving that to the discretion of the Postmaster General; that in 1867 he "fixed the basis by determining that the maximum pay should be allowed for a service of six round trips a week," thereby exhausting the control of himself and his successors over the factors of due frequency and sped made discretionary by the law of 1845; and that the law of 1873 was intended to save the Postmaster General from the exercise of all discretionary power over rates, except as to purely administative matters, and to fix the basis of pay as a servie of six round trips a week.

This is said automatically to have fixed the divisor as composed of six days in the week.

This process of reasoning finds no basis in the terms of the act of 1845, in the practice thereunder, or in the facts concerning the adjustments. It is a theory constructed merely to meet the needs of such contention.

In the first place, the Postmaster General did not fix, in 1867, the basis of pay under the law of 1845 by determining that maximum pay should be allowed for a service of six round trips a week, and thereby render that factor no longer discretionary.

The act of 1845 provided for a division of the railroad routes "into three classes according to the size of the mails, the speed with which they are conveyed, and the importance of the service." It fixed maximum rates of $300 per mile per annum for those of the first class, $100 per mile per annum for those of the second class, and $50 per mile per annum for those of the third class. Certain increases could be allowed for special conditions named in the act.

If, in 1867, the Postmaster General had "fixed the basis by determining that maximum pay should be allowed for a service of six round trips per week," definite evidence of it should be found in his reports and the adjustments published in them. There is not the slightest evidence in these sources of information to substantiate the assumption. On the contrary, there is ample evidence to disprove it.

For example, "Table E," appearing in the report for 1867 "shows the weight of mails and accommoda-

tions for mails and agents on railroad routes, with the frequency of the service and the rate of pay per mile per annum for mail transportation." (Report of Postmaster General for 1867, p. 72 *et seq.*) This table does not show actual readjustments made after the weighing of 1867, but it shows the rates of pay allowed on the several routes, the size of the mails, and facilities furnished (elements which entered into the determination of the classification).

Under the law the maximum rate of $50 per mile per annum was permitted to be paid for service by routes of the lowest or third class. These are set forth beginning at the bottom of pages 78–79 and continuing upon pages 80–81, 82–83, and 84–85. If plaintiff's assumption be true, one should find that where any of these routes belonging in the third class performed service of six round trips per week the pay was $50 per mile per annum. On pages 82–83 and 84–85 there are 32 routes at less than $50 per mile per annum, ranging from $47.77 down to $8.33, although all but 3 were six times a week or more. Moreover, these three exceptions which performed service only three times a week received a higher rate of pay per mile per annum than five on which service was six times a week.

Again, under the statute a maximum rate of pay of $100 per mile per annum was payable for service by routes of the intermediate or second class. These are set forth beginning on pages 74–75 and continuing on pages 76–77 and 78–79. If plaintiff were right, all these routes performed service of six round trips a

week, which should receive pay of $100 per mile per annum. On the contrary, however, out of the 145 routes authorized under the statute to receive a maximum pay of $100, 70 were paid at less than $100 per mile per annum. They ranged from $90 to $51.12, although all gave a service six times a week or more.

The same conditions are found in the routes of the first class, where even a less percentage received the maximum pay.

Hence the contention that in 1867 the Postmaster General determined that maximum pay should be allowed for a service of six round trips a week is not only not proved by the records but is disproved thereby.

Again, the act of 1845 provided "*inter alia*" "That if it shall be found necessary to convey over any railroad route more than two mails daily, it shall be lawful for the Postmaster General to pay such additional compensation as he may think just and reasonable, having reference to the service performed and the maximum rate of allowance established by this act." This certainly did not fix a standard of six round trips a week, but rather would have justified a basis of 12 or 14. The fact is that a study of the tables showing pay and the elements entering into the determination of the classification of the routes under the Act of 1845 does not disclose a sufficiently intimate relation between rate of pay and frequency of service to reach any conclusion respecting the importance given that element.

The form of order basing the full measure of pay on a service of not less than six round trips a week is known as in use from about 1873. Assuming, for argument, that the same practice of stating the pay had been followed theretofore, plaintiff's interpretation of its meaning and significance is wholly erroneous. The law of 1873 named one of the conditions upon which the pay allowed by the act should be earned, i. e., that the mails should be carried with "due frequency and speed." What should constitute "due frequency" was a matter to be determined in the discretion of the Postmaster General. Most mail service at that time (especially that performed on star routes) was performed by six round trips a week. Such statement in the order of the minimum frequency in railroad service was nothing more than a gauge for the guidance of the paying officer and the auditor in checking up the amount of compensation payable under the orders fixing the pay.

But assuming for the sake of argument plaintiff's position that the Postmaster General in 1867 fixed the minimum frequency of service he would require for the full measure of pay, it can not be said that such exercise exhausted his discretion and converted, for the future, his option into a fixed and immutable condition of rate. There is nothing in the history of the service nor its necessities which suggests it. On the contrary, such a result would be against public interest, contrary to good service in its future development, and in derogation of the reasonable and necessary administrative discretion

of the Postmaster General. Furthermore, if the language of the act of 1845 reposed a discretion in the Postmaster General, as is admitted by plaintiff, the act of 1873 as clearly and definitely continued and conferred upon him that discretion. In fact, with respect to the particular point, the act of 1873 was more specific and definite, for it provided in terms that "due frequency" should be a condition of earning maximum pay, but omitted any attempt to declare or indicate what "due frequency" should be. It is a remarkable proposition that Congress should have assumed to unalterably fix by law a frequency of six or any other number of round trips as entitling the railroads to the maximum pay, without any request or recommendation so to do, or apparent justification therefor, when such an act would have been a radical change in legislative and executive policy and against the public interest.

Further, the act nowhere says that the best service required by the Postmaster General shall entitle a road to maximum pay. It leaves the pay to be fixed by the Postmaster General, "not to exceed" the maximum named. It left his discretion to continue it or to change it from time to time, "not to exceed" the maximum, to be exercised as in his judgment conditions required.

The continuation by the Postmaster General of this gauge of payment has been as much misconstrued by plaintiff as its purpose has been. It argues (App. Bf. p. 12), "Under such conditions, prevailing in 1867 and prevailing now, a train

operated on Sunday was no more within the service contracted for than one or two extra trains run on week days," etc. And again (App. Bf. p. 17), "Even as to railroads performing service on Sunday, the average could not be changed, because Sunday service never was, nor is not now, within the contract and could be discontinued at any time without a reduction of compensation."

Here, appellant wholly disregards the facts as shown by the Postal Laws and Regulations for many years. Paragraphs 2 and 3 of regulation 1334, Postal Laws and Regulations, 1902, provide as follows:

RAILROAD SERVICE.

> 2. The compensation for service on each route shall be apportioned as nearly as practicable among the several trains carrying mail, according to the average weight of mail carried by each train.
>
> 3. Deductions will be made for failure to perform any trips, or a part thereof, on the basis of the mileage and the average weight of the mail carried by the train.

The same provisions are found in the Postal Laws and Regulations, 1913, as paragraphs 2 and 3, section 1488.

Therefore, while it is true that if a railroad company adopts and maintains a schedule of only six round trips a week the full measure of compensation named by the Postmaster General for the service will be paid, yet it is not true that service in excess of six round trips a week is not "within the service con-

tracted for." On the contrary, every train is given its pro rata value at the time the order fixing pay is made, based upon the average weight per day which it carries, and the deduction of that value is made from the pay in case the train is not run.

The reason for this is evident when the system of mail dispatches is considered. Mails are routed to destination in accordance with existing train schedules, which involve all the lines over which they must be carried, their schedule times of departure from and arrival at terminals and connecting points. A letter mailed at one hour of the day may take a different course of dispatch to the same destination than if mailed at another hour. These dispatches are all based upon published and known train schedules, upon which the public and the postal service rely. Therefore, the frequency of train operation, involving as it does the time of day of arrival and departure from any point, becomes of special importance. The public has a right to rely upon it and the postal service assures the public of the quickest dispatch and delivery. The continued operation of a scheduled train for the carriage of mail to be weighed at the time of the regular weighing is expected by the department, unless such a train be withdrawn and new schedules published. This allows a readjustment of the dispatch and carriage of the mails over the railroad on the basis of the revised schedule. Therefore, every train run is contracted for; deduction is made if a scheduled train fails to run; though deduction is not made if the train is permanently

withdrawn and the service does not fall below six round trips a week.

Even if appellant's premise were true, its conclusion would not follow unless it was mandatory upon the Postmaster General to use 6 as a divisor in all cases. In this exigency the plaintiff assumes that the practice of naming the minimum requirement as above set forth fixed a "contract" or "working" day (App. Bf. p. 16), and that by the act of 1873, "with six round-trip service having been made universal, it naturally and automatically fixed the divisor six." (App. Bf. p. 17.)

It argues that it would have been and is now impossible to apply the act of 1873 to conditions as they actually existed, or as they exist now, so as to get one uniform divisor out of it, without having an assumed daily average for one or the other of the six or seven day routes except upon the grounds assumed by plaintiff, namely, a common contractual service by all roads of six round trips a week. (App. Bf. p. 19.)

But appellant's own statement carries with it conclusions which destroy it. It says (App. Bf. p. 17):

> The six-round trip service having been made universal, it naturally and automatically fixed the divisor 6.

Appellant here admits that the Postmaster General could have exercised his discretion at one time. Hence he could have made some other determination with equal authority. The report for 1867 shows the frequency of railroad mail service from 3 to 61 trips

a week. Many are 6, 12, 7, 14, 8, etc. (Report of Postmaster General, 1867, pp. 72–85.) The Postmaster General could have made 12 or 14 round-trip service universal, and by plaintiff's logic such action would have fixed "the divisor" at 12 or 14, as the case might be. This would lead to an absurd result.

It is obvious that the fundamental assumption of plaintiff as to the meaning of the provisions of the act of 1873 is untenable. There was indeed an express contract—one that has been fully performed. But it involved no use of a divisor fixed by law or selected in any manner other than by the exercise of the discretion conferred upon the Postmaster General. In fact, as we have shown elsewhere, the divisor as such does not enter into the contract, as made, at all.

II.

Appellant suggests an implied contract growing out of the fact that a part of its lines were aided by land grants, but misconceives the measure of the value of the service if such contract existed.

Appellant urges that if it be held that there was no express contract it is entitled to recover under an implied contract, and the terms upon which recovery shall be had grow out of its obligations as a land-grant road. It will be observed, however, that this contention necessarily eliminates all consideration of the terms of pay for the service performed over all appellant's routes which are not land-grant mileage. This seems to involve a necessary concession of the Government's contention that as to those routes the terms named by the

Postmaster General in his readjusting orders must govern the rights of the parties, and the matter may be left with what is said in our brief in the *New York Central* case.

As to the land-grant routes, it may first be noted that the supposed obligation of the aided carrier to transport the mails over such routes was one wholly for the benefit of the United States. And the Postmaster General, in dealing with the appellant, did not purport to rely upon the legislation quoted, but negotiated with them as with the other claimants upon a basis of mutual freedom to contract. He may have done so because it was impracticable to depart from a uniform method of departmental administration and to set up particular machinery for handling these sporadic land-aided routes. He may have done so because the statute, while purporting to impose an obligation, omitted any effective penalty for disobedience, and failed to point the way to its practical enforcement. Or he may have done so for other reasons. His motives are immaterial. If, as we say, and as appellant itself contends, the service was rendered under express contract, the terms of that contract govern the relations between the parties. *Chicago and Northwestern Railroad Company* v. *The United States*, 15 Ct. Cls. 232, 245; 104 U. S. 680; *Chicago, Minneapolis and St. Paul Railroad Company* v. *The United States*, 104 U. S. 687.

In dealing with this subject, however, appellant seems to depart from its own theory of express contract. It appears to contend that it had no

option with respect to the performance of service; that therefore performance raised no legal presumption against it; that it is consequently entitled to recover a reasonable value of the service performed; and that such reasonable compensation is necessarily measured by the compensation allowed by the Postmaster General under the statutes prior to the operation of the divisor order No. 412.

Taking the case in the most favorable light for appellant and conceding *arguendo* that there was no express contract with respect to these land-grant routes, that appellant was under perpetual contract to carry the mails, and that there were no other factors affecting the case, the appellant became entitled by its performance of service to reasonable and just compensation.

What the Postmaster General did meets this requirement. The compensation allowed appellant was at the maximum rates provided by law. These rates were applied to average daily weights ascertained by the application of Postmaster General's order No. 412. This ascertainment was a proper exercise of the discretionary powers reposed in the Postmaster General, as fully set forth in the brief in the case of New York Central and Hudson River Railroad Company, No. 133.

In order for appellant to prevail in this contention it must show that the compensation which was allowed by the Postmaster General was not reasonable and just. No evidence whatever was submitted, no facts are found which tend to establish the

contention that the rates allowed were unreasonable or unjust, or to establish any other rate of pay as reasonable and just.

To meet this difficulty, however, appellant argues that "the language of the law fixes what reasonable compensation is" (App. Bf. p. 77), and then endeavors to establish the fact that under the decisions of the courts the maximum rate fixed by the act of 1873 and amending acts is reasonable compensation. This argument, of course, leads back to appellant's contention that those statutes fixed rates over which the Postmaster General has no control, which has elsewhere been shown to be unsound. It involves, of course, the further assumption that both the rate and the method of establishing its basis of application were thus fixed. The quotations in appellant's brief from the *Eastern Railroad case* and *Jacksonville, Pensacola and Mobile case*, mean nothing for appellant's contention here more than that in the absence of other evidence the rates fixed by the statutes could be regarded as reasonable. There would be no dispute upon this point.

The case of *Jacksonville, Pensacola and Mobile Railroad Company* v. *The United States* (21 Ct. Cls. 155), cited by appellant, is in fact unfavorable to its contentions. That claimant was a land-grant railroad company, which during the period preceding July 1, 1875, was carrying mails under an express written contract. Thereafter, from July 1, 1875, to June 30, 1876, it performed service under orders of the Postmaster General, and the claimant contended that

under these conditions it carried under an implied contract at the preexisting rates. The Court of Claims refused to take this view of the matter and decided adversely to the claimant, saying:

> When, therefore, on and after July 1, 1876, the company carried the mails without any special contract with the Postmaster General, it was bound by the contract of that act, making its compensation subject to the laws of Congress. The company had no option in the matter. It was obliged to carry the mails, and to accept whatever price Congress might determine, and that price might be established after, as well as before, service performed. (P. 170.)

The laws of Congress fixing the rates for land-grant roads included the laws fixing the rates for service generally; that is to say, when Congress took affirmative action fixing the rates for service on land-grant roads such action was merely a reduction of 20 per cent below the rates otherwise provided for service. The basis of rates allowable therefore were maximum and subject to all the discretion which the Postmaster General could exercise and did exercise with reference to the service generally.

The case was appealed to this court and the opinion below was affirmed. (118 U. S. 626.) Mr. Justice Field, for the court, said:

> * * * But where no such collateral stipulations are made, and no duration of time is prescribed, but the service is exacted simply from the obligation growing out of the ac-

> ceptance of the condition of the land-grant, it rests in the discretion of the Postmaster General to change the price, from time to time, as in his judgment the public interests may require. It is not to be presumed that in such matters he will act in an arbitrary or unreasonable manner. For any abuse of his authority there is the security, which exists with reference to the action of all heads of the executive departments, in their responsibility to their superior, and liability to be called to account by Congress. No abuse of authority, however, is suggested in the present case. An error of construction as to the rights of the petitioner is alone alleged. (628.)

And again, speaking with reference to the transition from the terms of an express written contract to the terms expressed merely by the Postmaster General's order, involving the Postal Laws and regulations, Mr. Justice Field said as follows:

> * * * The Postmaster General may have deemed it expedient for the public interest to change, enlarge, or omit entirely the requirements previously prescribed, and to call for others of a different character. No implication can arise, one way or the other from his inaction. All that the company could ask or expect under the law was that he should prescribe a reasonable compensation for its service, and that the service would be continued so long as the public interests should require. No implication of law could extend further than this.

Additional light is thrown on the matter by a survey of the statutes upon which the appellants

base their argument. The facts, in this connection, are that the appellant, a corporation of the State of Wisconsin, is the successor of the Northern Pacific Railroad Company, which was chartered by Congress (Act of July 2, 1864) and received grants of land. These grants were accompanied by a proviso (*Oregon & California R. R.* v. *United States*, 238 U. S. 393) that the railroad thus aided should be subject to the use of the United States for postal and other purposes subject to such regulations as Congress might impose respecting charges for Government transportation. By reason of its ownership of certain other parts of its system, appellant has become subject as to those parts to the requirements of certain granting acts whose tenor, so far as material, is summed up in the general statute of 1872 (Act of June 8, 1872, 17 Stat. 309). That statute is as follows:

> That all railway companies to which the United States have furnished aid by grants of lands, right of way, or otherwise, shall carry mails at such prices as Congress may by law provide, and until such price is fixed by law the Postmaster General may fix the rate of compensation.

These circumstances do not affect the pending question.

Even in that field, however, it does not help appellants.

For, it having been established that Congress had never provided by law what price shall be paid for the carriage of mails, over these railroads or any

others, except as elsewhere noted by prescribing maxima, the price fixed by the Postmaster General must control as to these. That price has been paid.

From that result appellant can have but one path of escape. It leads, however, to the same conclusion.

For either the Postmaster General's determination of a proper price has the binding force of law or else the situation of these routes is to be determined, as is that of all the nonland-grant aided routes of this appellant and of other claimants, in the light of the facts and by the application of ordinary principles of the law of contracts to the acts of the parties, each being wholly free to contract or to refuse to contract as they saw fit. As has been shown, under those tests there can be no recovery.

CONCLUSION.

On all the theories advanced by appellant it fails to establish a right to other and additional compensation than that which has been allowed by the Postmaster General and which it has fully received in payment for service performed. The judgment of the court below should therefore be affirmed.

ALEX. C. KING,
Solicitor General.
LARUE BROWN,
JOSEPH STEWART,
Special Assistants to the Attorney General.

DECEMBER, 1919.

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MAIL DIVISOR CASES

SUPREME COURT OF THE UNITED STATES.

No. 109.—October Term, 1919.

NORTHERN PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AS AMICI CURIÆ ON BEHALF OF THE EL PASO & SOUTHWESTERN R. R. CO., THE MORENCI SOUTHERN RY. CO., THE LOUISIANA & NORTH WEST R. R. CO. AND THE LAKE TAHOE RAILROAD & TRANSPORTATION CO.

WILLIAM R. HARR,
CHARLES H. BATES,

Attorneys.

SUPREME COURT OF THE UNITED STATES.

No. 109.—October Term, 1919.

Northern Pacific Railway Company, Appellant, *vs.* The United States.	Appeal from the Court of Claims.

BRIEF AS AMICI CURIÆ ON BEHALF OF THE EL PASO & SOUTHWESTERN R. R. CO. ET AL.

The El Paso and Southwestern Railroad Company, the Morenci Southern Railway Company, the Louisiana and North West Railroad Company and the Lake Tahoe Railway and Transportation Company, are claimants in cases now pending in the Court of Claims, which cases (by order of the Court of Claims) are held there awaiting the determination by this Court of this and other cases now before it involving the validity of the orders of the Postmaster General (Nos. 165 and 412, issued March 2, 1907, and June 7, 1907, respectively) changing the method, theretofore in vogue for many years, of ascertaining the daily average weight of mails on railroad routes, which change resulted in considerable loss of revenue to the railroads. Said companies have therefore a special interest in the determination of this case.

In this brief we shall not attempt to review the facts and authorities at length, but simply to state, as concisely as possible, the fundamental considerations which we think govern the determination of the question presented.

I.

THE SOLE AND ONLY QUESTION INVOLVED IS THE VALIDITY OF ORDERS NOS. 165 AND 412 OF THE POSTMASTER GENERAL.

The Distance Circulars signed by the appellant company, covering the mail routes operated by it, contained the following provision:

> "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

In signing these circulars or agreements the Northern Pacific Company notified the Post Office Department that it took exception to said Orders No. 165 and 412 of the Postmaster General, whereupon they were advised by the Department that it would not—

> "enter into contracts with any company by which it may be excepted from the operation or effect of any postal law or regulation; and it must be understood that, in the performance of service, from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may hereafter become applicable during the term of this service". (See Findings of Facts XI, Record, p. 48.)

Manifestly, the only fair reading of the above stipulation in the Distance Circulars is that the company would accept and perform the service contracted for *upon the conditions prescribed by law* and the *lawfully authorized* regulations of the Post Office Department applicable thereto; and the communications between the appellant and the Department with respect to Orders Nos. 165 and 412 of the Department merely serve the purpose of showing that there was a question between the appellant company and the Department as to the validity of those orders. To hold otherwise would be to say that the appellant agreed to perform the service contracted for *without regard to "the conditions prescribed by law"* and subject to *any* order or regulation of the Post Office Department, *no matter how arbitrary and unreasonable* the same might be, and even though such order or regulation *were not only unauthorized by law, but in conflict with the manifest will and intent of Congress itself,* which as we shall now proceed to show is precisely the case with respect to said Department Orders Nos. 165 and 412.

It is sometimes said that the railroads are not obliged to contract with the Postmaster General for the carriage of the mails, but this is not altogether true of what are known as the land-grant roads, such as the Northern Pacific Railway Company, and even as to the non-land-grant railroads it is to be remembered that the public interest is so involved in the prompt and continuous carriage of the mails by these great railroad systems that the managers and directors thereof are necessarily very reluctant to refuse to contract with the Postmaster General, and whenever possible prefer to rely upon Congress and the courts for

their protection, especially where, as here, some of the conditions and restrictions sought to be imposed upon them by the Postmaster General appear to them to be wholly arbitrary and unwarranted.

In the light of these considerations it would seem that fairness and justice require the courts, in an issue of this kind, to be extremely careful to see that the limitations and conditions which Congress has provided with respect to the compensation of the railroads for their services in performing the important public service of carrying the mails are duly observed by the Postmaster General.

It is further to be observed that, in practice, the Post Office Department has allowed and paid the railroads on routes of the character involved in this case, under their contracts, the *full rates* fixed and allowed by the Act of 1873 and subsequent statutes; *and the record indicates that, in fixing the compensation of the appellant company for the services involved in this case the Postmaster General did not undertake to allow said company anything less than the* FULL RATES *fixed by the statute less the authorized deductions on account of land-grant.* The sole ground for the reduced compensation allowed by the Postmaser General to the appellant company, as the findings of fact plainly show, was the fact that he was of opinion that the proper method of ascertaining the average daily weight of mail prescribed by Congress for the purpose of determining such compensation was that promulgated in his said Orders Nos. 165 and 412, and not that which had always theretofore been followed.

The supposed exceptions to the rule that the full rates fixed and allowed by the statute are always paid, referred to in the brief (p. 66) filed by the Solicitor

General in the Chicago & Alton case (No. 30, Oct. Term, 1916), are in reality not exceptions at all. "Agreement routes" are those established within a contract period, where no weighing has been had to fix the average daily weight. It is a *casus omissus* in the statute which necessarily has to be supplied by the Postmaster General. When the new contract term commences, the Department immediately begins to pay the full rate. In the case of "lap service," the full rate authorized by the statute is apportioned between the roads involved. "Blue tag" matter is not mail, but freight, shipped on fast freight trains and properly paid for as freight. Contracts for weights intermediate those named in the statute, made, as the Solicitor General states, on a *pro rata* basis, are manifestly in accord with the rule. And, as above stated, even assuming that the Postmaster General has authority, under the statute, to contract for the carriage of the mails at less than the full rates prescribed by the statutes of Congress, the point is that, on routes of the character here in question, and in the contracts here involved, he has not undertaken to contract for less than the *pay per mile* authorized by the statute for the respective average weights involved, *properly* ascertained.

II.

ORDERS NOS. 165 AND 412 OF THE POSTMASTER GENERAL ARE IN CONFLICT WITH THE CONDITIONS PRESCRIBED BY CONGRESS FOR ASCERTAINING THE AVERAGE DAILY WEIGHTS OF MAIL.

It will be observed that by the Act of March 3, 1873 (17 Stat. 538) the Postmaster General is authorized and directed to readjust the compensation thereafter to be paid for the transportation of the mails on railroad routes—

> "*upon the conditions* and at the rates hereinafter mentioned, to wit:"

Then following certain specific conditions, among which is the proviso that—

> "the average weight to be ascertained *in every case* by the actual weighing of the mails for such number of successive *working* days, not less than thirty," etc.

Manifestly, in adjusting a railroad's compensation, under this statute, the Postmaster General has no authority, by regulation, to disregard the express mandate of Congress as to how the average daily weight of mail carried should be ascertained, *and any order or regulation issued by him attempting so to do is simply void and of no effect.*

We are not concerned, in this case, with the question as to the right of the Postmaster General, under the Act of March 3, 1873, as affected by subsequent

legislation, to allow less than the maximum rates fixed by that Act for the transportation of the mail. Assuming that he has such power, the point here is that he had not attempted to exercise it but simply, by said Orders Nos. 165 and 412, *to change the method prescribed by Congress for ascertaining the average daily weight of mail transported.*

It is true that the Act of March 3, 1873, is not as clear as it might be as to how the average daily weight of the mails is to be ascertained. But any ambiguity or uncertainty in that respect had been fully cleared up at the time the appellant signed the aforesaid contracts, by the contemporaneous and long-continued practical construction of the statute by the Department of the Government charged with its administration, which practical construction, as the record shows, *has been repeatedly ratified and sustained by Congress* despite frequent efforts by the Post Office Department, in recent years, to have it changed. In other words, Orders Nos. 165 and 412 were issued by the Postmaster General long after the exact method of obtaining the daily weight, under the rule prescribed by Congress in the Act of 1873, had been thoroughly settled and established.

The Findings of Fact made by the Court of Claims in this case show, in brief, that the Postmaster-General, in 1907, by said Orders Nos. 165 and 412, undertook to do what Congress had repeatedly refused to do or sanction (Findings of Fact VI, VIII and IX, Record, pp. 34-39); what the Acting Attorney General, in 1884, *in affirming the correctness of said established method of obtaining the daily average weight of mail,* has said *"would defeat the intention of the law and cause no little embarrassment"* (Finding of Fact VI, Record p.

35); what Congress, in 1905, had deliberately refused to do when it increased the weighing period from thirty to ninety "successive working days" (Finding of Facts VIII, Record, pp. 36-37); and what Congress, in 1907, just prior to the issuance of said orders, had again deliberately refused to do (Findings of Fact IX, Record, pp. 37-39).

If the change in the method of ascertaining the average daily weight of the mail sought to be inaugurated by the Postmaster General in 1907 by said Orders, despite the deliberate refusal of Congress to authorize the same, were in the interest of justice and fair dealing, or for the purpose of carrying out some declared purpose or policy of Congress, there might be some justification for upholding it, but when it appears, as shown by the Findings of Fact herein, that such a change will work a manifest injustice upon the railroads carrying the mails seven days in the week, by enormously decreasing their compensation, and also that Congress has repeatedly and deliberately refused to authorize or sanction such a change, no good reason can be perceived for sustaining said orders.

If ever there was a case of wilful and arbitrary action on the part of an Executive Department of the Government, we have it in these orders of the Postmaster General undertaking to do what Congress, *at that very moment*, had deliberately refused to do, to the consequent injury of the railroads. We refer in saying this to the legislative history of the bill making appropriations for the Postoffice Department which became a law on March 2, 1907, which legislative history is set out in Finding of Fact IX (Record, pp. 37-39).

It will be seen from said Finding IX that Congress again deliberately refused, in passing the aforesaid appropriation bill, to change the established method of

ascertaining the daily average weight of mail, as proposed by the Post Office Department, and then and there rejected amendments to that effect, even after one such amendment had been adopted (but without debate or explanation) in the Senate; and thereupon and notwithstanding, as stated in Finding X, the Postmaster General proceeded, upon his own motion and responsibility, to promulgate Orders Nos. 165 and 412 for the purpose of accomplishing that which Congress had just refused to do. (Record, pp. 39-40.)

It is further to be observed that, as appears in said Finding of Fact IX, Congress, in said Post Office Appropriation Act approved March 2, 1907, authorized and directed the Postmaster General to make certain limited reductions only in the compensation to be paid the railroads for routes carrying an average weight per day of five thousand pounds and over; and that said Act made no change and authorized none to be made in respect to the compensation to be paid on other routes. Yet *on the very day this Act was approved* the Postmaster General, by said order No. 165, proceeded to reduce the compensation of the railroads on *all* mail routes by changing the established method of determining the average daily weight, thus *further decreasing* the compensation to be paid the railroads on those routes as to which Congress, in said Act of March 2, 1907, had just authorized only a certain and specific reduction! (Record, pp. 38-39.)

It is also to be observed, that, as set out in Finding of Fact XIII, the attention of Congress was again called to this matter of ascertaining the average daily weight of mail when the bill making appropriations for the Post Office Department for the fiscal year ending June 30, 1909, was before it, *and that Congress at that time again refused to sanction or approve the*

change in such method proposed by the Postmaster General in said Orders Nos. 165 and 412. (Record, pp. 48-49.)

Can there be any doubt, after all this, as to the wishes of the legislative branch of the Government in this matter?

III.

THE METHOD OF ASCERTAINING THE DAILY AVERAGE WEIGHT OF MAIL FOLLOWED BY THE POST OFFICE DEPARTMENT FROM 1873 TO 1907, AND RATIFIED AND APPROVED BY CONGRESS AS AFORESAID, IS ESSENTIALLY JUST AND EQUITABLE.

Upon this point it would seem sufficient to quote Finding of Fact VII of the Court of Claims, which reads (Record, p. 36):

> What is called a documentary history of the Railway Mail Service from its origin in 1834 to the present time; prepared by the general superintendent of the Railway Mail Service, *was transmitted to the Senate with a letter by the Postmaster General* on January 21, 1885, *in compliance with a resolution of the Senate,* and, among others, said document contains the following statements:
>
> "Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, *but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.*
>
> * * * * * * *
>
> "The present rule is on those roads carrying the mails six times a week to weigh the mails on

30 consecutive days on which the mails are carried, which would cover a period of 35 days; dividing the aggregate 30 weighings by 30 will give the daily average. On those roads carrying the mails seven times per week the weighing is done for 35 consecutive days (including Sundays) and the aggregate divided by 30 for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for 35 days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by 35 we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore, with a higher daily average, and, therefore, a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered.

"*The present method gives no additional pay for the additional seventh train,* but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily and including Sundays."

Said document was printed as Senate Executive Document 40, Forty-eighth Congress, second session.

The argument against this long-established and practical method of ascertaining the average daily weight is purely technical, theoretical and academic only, substituting form for substance.

From the passage of the Act of March 3, 1873, down to the promulgation of said Orders Nos. 165 and 412 in 1907, the Post Office Department treated this question from the sensible and practical standpoint, and

Congress, after being repeatedly advised thereof, refused again and again to sanction any change in the method adopted.

It is to be observed that, under their contracts with the Post Office Department, the railroads have never been *required* to carry the mails more than *six round trips* (*occupying six days*) a week, and that by discontinuing their Sunday service on the seven day routes, and thus inconveniencing the public, they might have accomplished, under the terms of their contracts, exactly the same result, so far as the average daily weight of mail is concerned, as was accomplished by the practical method adopted by the Department, under the Act of 1873, of ascertaining that average.

For the Courts now to uphold the Post Office Department in its attempt to reduce the compensation of the railroads by changing the prescribed and established method of ascertaining the daily average weight of mail, after the repeated refusal of Congress to authorize or sanction such change, would be to sustain a gross abuse of executive power and to infringe upon the legislative domain, as well as to impair the validity of existing contracts. This latter point we will elaborate below.

It is to be noted that the daily average weight of mail so ascertained is used as a basis for fixing the compensation of the railroads for carrying the mail for a four-year period, during which the probabilities have always been that the weight of mail would be considerably increased. A method, therefore, which at least did not discriminate against roads that were carrying the mail seven days in the week, although required, by their contracts, to carry them only six days, was eminently more fair and just than one which would discriminate against such seven-day routes. It

will be observed further that under no circumstances, not even by changing the divisor so as to include all the days in the weighing period, instead of the number of working or week days, would the railroads be paid for the weight of mail actually carried, and that the method originally adopted and followed, for so many years, with the knowledge and approval of Congress, was more apt to approximate the actual weight of mail carried than that attempted to be substituted by the Postmaster General in 1907 by the orders in question.

IV.

SAID ORDERS NOS. 165 AND 412 OF THE POSTMASTER GENERAL CONSTITUTE A VIOLATION OF THE TERMS OF APPELLANT'S CONTRACTS.

It will be noted that appellant agreed, as stipulated in the above quoted provision of the Distance Circulars—

> "to accept and perform mail service *upon the conditions prescribed by law* and the regulations of the Department applicable to railroad mail service."

As above pointed out, one of "the conditions prescribed by law, was the provision in the Act of 1873, as amended in 1905, that in fixing the railroad's compensation the average daily weight of mail should be determined by the Postmaster General in a certain way, which way, including the divisor to be used, had been definitely established at the time appellant entered into said contract, to wit, in July, 1907, and too, by the action of the Post Offce Department itself,

acquiesced in by the railroads. Clearly, therefore, appellant, when it signed said contracts, had the right to rely upon said established method of ascertaining the daily average weight of mail as one of the conditions prescribed by law for fixing its compensation, and to disregard, as it had notified the Postmaster General it would, his unauthorized and unlawful attempts to change that method. Clearly also it was a breach of appellant's contract for the Postmaster General thereafter to insist upon disregarding said established method of determining said average weight of mail and insist on substituting the method prescribed by Orders Nos. 165 and 412.

In short, the contract was made in the light of the fact that the long-established method of determining said average weight was one of "the conditions prescribed by law for the adjustment of appellant's compensation," and the Postmaster General had no authority to depart from that method in determining said average weight for the purpose of fixing appellant's compensation.

The suggestion that the method of ascertaining the daily average weight, prescribed by Congress in the Act of 1873, was merely for the convenience of the Postmaster General in determining the compensation to be allowed on a given route, and therefore he could change that method as his judgment and discretion dictated is also clearly without merit. The very purpose of this said provision in the Act of 1873 was to limit the authority of the Postmaster General in adjusting the railroads compensation, for the better protection, presumably, of both the railroads and the Government.

The further suggestion that there is no ambiguity in the Act of 1873 is necessarily predicated upon the hypothesis that the method originally adopted by the Post Office Department to determine the daily average weight of mail, by using as the divisor the number of "working days" in the weighing period instead of the whole number of days covered by the weighing period, was obviously and unquestionably erroneous, notwithstanding that said method was followed by the Department from 1873 down to 1907; notwithstanding Congress has repeatedly and deliberately refused to change or authorize said method to be changed, notwithstanding the Acting Attorney General, in 1884, declared such method to be correct; notwithstanding the Court of Claims, in its original findings of fact and conclusions of law in the Yazoo and Mississippi Valley Railroad case, found said method to be correct; notwithstanding this court, on the appeal in that case and the case of the Chicago & Alton Railroad Company, was equally divided as to the correctness of the second judgment rendered by the Court of Claims upon said proposition; and notwithstanding the fact that no court or counsel, despite all the various and conflicting decisions and opinions that have been had in this matter, has yet been able to state, in an absolutely clear and convincing manner, just what the provision in the Act of 1873 as to ascertaining said average weight means. Unquestionably, therefore, said statute is ambiguous, and if it be ambiguous, appellant's contentions must be sustained, because, as above pointed out, that ambiguity had been resolved, in the interests of justice and right, by the contemporaneous

and long-continued practical construction of the statute by the Department charged with its administration, which construction has been frequently and deliberately sustained by Congress, and had been so sustained and practically adopted by Congress just prior to the Postmaster General's attempt to change the same by the orders in question.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 109.

NORTHERN PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF, AMICI CURIÆ ON BEHALF OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

ABRAM R. SERVEN,
BURT E. BARLOW,
Amici Curiae.

THOMPSON & SLATER,
Of Counsel.

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BRIEF, AMICI CURIÆ ON BEHALF OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

This brief is filed, by leave of the court, by counsel whose names are signed to it, on behalf of the Chicago, Burlington, and Quincy Railroad Company.

The findings of fact returned to this court by the Court of Claims in the case of the Northern Pacific Railway Company *vs.* The United States is made the basis of this brief, and all references herein made to the record refer thereto.

The assignment of errors appearing in appellant's brief is adopted.

The interpretation of the controlling statute in this case has been twice argued before this court, and at the conclusion thereof the decision of the lower court was affirmed by an equal division of opinion of the members of this court.

After the year 1860 the Congress of the United States, desiring to aid in the construction of railroads through the undeveloped portion of its territory lying in the West and South, at different times, by congressional enactment, granted to railroads, upon the construction of certain mileage, portions of the public land, and as a condition of such grants provided:

> "That the United States mail shall be transported over said road, under the direction of the Post Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law the Postmaster General shall have the power to determine the same" (Rec., p. 29).

Congress also provided for the incorporation of railroad companies for the purpose of constructing railroads in such territories, and as a condition of incorporation and further privileges granted by Congress, made certain restrictions on such railroads, under which they were made post routes and subject to such regulations as Congress might impose, restricting charges against the Government for services. The appellant, the Northern Pacific Railway Company, as to part of its railroad right of way, is subject to those acts of Congress granting lands to railroad companies and as to part of its right of way is subject to the act by which the Northern Pacific Railroad was chartered by Congress, under all of which statutes it was required to transport mail over its railroad when tendered to it by the United States (Rec., p. 29).

In 1873 Congress passed an act relative to the transportation of mails by railroad companies, the material part of which is as follows:

"*Provided,* That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed: that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; * * * the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, * * * and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct" (Rec., p. 50).

Prior to 1875 the mails were weighed by the railroad companies. After 1875 the mails were weighed by the Post Office Department (Rec., p. 51). The Postmaster General, by order, divided the territory of the United States into four sections and those sections into railway mail routes. Over certain of these railway mail routes trains ran 7 days per week and over other mail routes trains ran 6 days each week. From 1873 to 1905 the method used in obtaining the average weight of the mails was to weigh such mails for the minimum statutory period of 30 consecutive working days, and in making such weighings Sunday was not counted as a working day (Rec., p. 33). On those routes upon which Sunday trains were operated the mails were weighed on Sunday and the weight so ascertained was added to the weighing made on Monday. The mails carried on Sunday were considered as Monday mail. As a result of this method the period over which the weighing took place covered 35 days,

as 5 Sundays would intervene between the first and the thirtieth of 30 consecutive working days. The weights so obtained were added together and the result divided by 30 to secure the average weight of mails carried per working day (Rec., p. 33).

At different times between 1873 and 1907 the act of 1873 was re-enacted, changed, and modified, but at no time was the method by which the average weight of mails was to be determined changed. In 1874 Congress re-enacted the act of 1873. In 1875 Congress provided that the weighing of the mails should be done by the employees of the Post Office Department and not by the railroads (Rec., p. 51). In 1876 Congress reduced the maximum compensation which could be paid to railroads for mail transportation 10 per cent from that theretofore provided (Rec., p. 51). In 1878 the maximum compensation payable to railroads for mail transportation was further reduced 5 per cent by Congress (Rec., p. 52). In 1905 Congress re-enacted the method by which the average weight should be found, and changed the number of working days which should be included within the weighing period from not less than 30 to not less than 90, the exact wording of the provision being as follows:

> "*Provided,* That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct" (Rec., p. 52).

In 1906 Congress empowered the Postmaster General to collect fines from railroad companies for delay in transporting the mail (Rec., p. 53). In 1907 Congress reduced the maximum sum which should be paid for railway mail trans-

portation on routes carrying more than an average weight of 5,000 pounds per day 5 per cent (Rec., p. 53).

February 12, 1907, the Postmaster General caused to be sent appellant a distance circular, which was used for the purpose of determining the mileage and average daily weight of mails on the routes specified in the circular. At the bottom of the circular the following clause appears:

> "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service" (Rec., p. 40).

March 2, 1907, the Postmaster General issued order No. 165 and June 7, 1907, order No. 412, as follows:

> *Order No.* 165. "That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day."
>
> *Order No.* 412. "Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:
>
> " 'That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day' " (Rec., p. 39).

Thereafter the Postmaster General submitted order No. 412 to the then Attorney General, who rendered an opinion sustaining the legality thereof. The distance circular sent to appellant was signed and returned to the Postmaster General, and as a part thereof appellant excepted to Order No. 165 and order No. 412, and accompanying the signed distance circular was a formal protest against the said orders on the ground of their illegality (Rec., p. 43).

The Post Office Department did not consent to the change in its distance circular and notified appellant that:

> "And during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service" (Rec., p. 44).

The Postmaster General, upon the return of the distance circular, caused the amounts to be paid to appellant for the carriage of the mails over the routes in question to be figured, and in so figuring the payment to be made therefor divided the sum of the weighings which were made for 90 days by 105, and the sum of the weighings which were made for 105 days by 105 (Rec., pp. 39 and 46). Notice was given of this adjustment of compensation for mail transportation to appellant, the last clause of such notice reading as follows:

> "This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than 6 round trips per week" (Rec., pp. 42 and 43).

After the promulgation of order No. 412 appellant carried the mails on the various routes specified in the record as seven-day routes for 7 days in each week and as six-day routes for 6 days in the week and was paid therefor, upon the basis of the average daily weight of mails carried, and this average daily weight of mails carried was found by weighing the mails for 105 days, including Sundays, and adding such weighings together and dividing the sum thereof by 105. The facts touching the correspondence between appellant and the Post Office Department as to each route were identical, it being claimed as to each route by appellant that Sundays should not be included in the weighing period, and that the sum of the weighings for 105 days should be divided by the 90 working days or secular days composing such period.

The difference between the amount paid to appellant under the Post Office Department's method of determining the

average daily weight of the mail and the sum which would have been paid to appellant by using the method provided by statute for determining the average daily weight of the mail is $704,871.63, and this is the amount in issue.

The question presented to this court for determination is whether in determining the pay per mile per annum for the transportation of the mails the average weight of mail per day shall be found by adding the weights carried for 90 successive working days, exclusive of Sundays, the Sunday mail, if any, being added to the Monday weight and the result divided by 90, or whether Sunday shall be treated as a working day and included in the number of days making up the weighing period, thus causing the sum of the daily weights where the weighing period covers 90 secular days and the mail is carried on Sunday to be divided by 105 instead of by 90, inasmuch as 15 Sundays intervene in 90 secular days.

I.

What is the proper construction of that part of the act of 1873, as re-enacted and amended, which directs the method of ascertaining the average daily weight of the mails? (The mandatory character of the act is fully analyzed in the discussion of the lower court's opinion, sub-division 4, Part VI, page 48 herein.)

The material part of the act of 1873 amended and re-enacted, presented for consideration in this case, is as follows:

> *Provided,* That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and

> warmed, shall be provided for route agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; * * * the average weight to be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, at such times, * * * and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct.

The question now presented is what is the proper construction of the above statute, regardless of any construction placed upon it heretofore by either the Department of Justice or the Post Office Department, for in the final analysis it is the act of Congress which will govern. The first sentence of the statute is that which authorizes and directs the Postmaster General to readjust compensation paid for the transportation of mail. The authority given to him is not unlimited, but is expressly limited to the *conditions* and *rates mentioned* in the act.

The courts do not read into the acts of Congress exceptions that are not therein contained, and they do not read out of acts of Congress conditions and limitations that are contained therein. This court will not construe the act of Congress as ending before the enumeration of the conditions and rates mentioned in the act. If Congress had desired to place no conditions or limitations upon the compensation to be paid for the transportation of the mails the act would have read as follows:

> "That the Postmaster General be and is hereby, authorized and directed to readjust the compensation hereinafter to be paid for the transportation of mails on railroad routes."

The language of the act is specific and clear as to the conditions and rates upon which compensation for the transportation of mails is to be readjusted, and those conditions and rates are the only ones which were legally binding upon the United States. This case does not deal with the discussion of the conditions of railway mail transportation, and therefore that part of the statute specifying such conditions is not analyzed. The case does involve the rates for railway mail transportation, and that part of the statute which prescribes the rates to be paid is that which is presented to the court for construction. The statute limits the maximum sums to be paid for the transportation of the mails, after the average weight of mails carried the whole length of their route per day has been determined. The statute provides that not more than certain fixed sums shall be paid for the carriage of the mails where the weight of the mails so carried equals an average weight per mile per day of certain amounts. No question is raised in this case as to the maximum rate fixed in the statute for the carriage of the mails, and this question is not in issue.

The method of obtaining the average weight per day is explicitly set forth in the statute in the following words:

> "The average weight to be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times, * * * and not less frequently than once in every four years."

The wording of the statute clearly directs the manner in which the average weight per day of the mails shall be ascertained.

> "Where a statute directs the performance of certain things in a particular manner, it forbids by implication every other manner of performance."
>
> State *vs.* Crawford (N. D.), 162 N. W., 710-717.
>
> State vs. High (Ariz.), 130 Pac., 611.

The method, then, of obtaining the average weight of mails prescribed by the statute must be followed in obtaining such average, and every other method of obtaining an average weight is excluded.

Neither the times of weighing nor the number of days making a weighing period are in dispute. It is only the kind of days that are to be included in the weighing period that is in dispute.

> "It is a rule alike applicable to statutory and constitutional law that when the law directs something to be done in a given manner, or at a particular time or place, then there is an implied prohibition against any other mode or time or place for doing the act."
>
> State *vs.* Stark Co., 14 (N. D.), 368; 103 N. W., 914.

This is but another way of stating that a manner of doing an act specified by statute must be literally complied with. Where the language of the act is explicit, then no departure from the words used in the act can be permitted.

> "But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provision."
>
> Denn *vs.* Reid *et al.*, 35 U. S., 524-527.

The statute provides that the weighing period shall consist of "working days," and it is these words in the statute over which the present dispute has arisen. That the words "working days" did not at that time mean to Congress the same thing as the word "day" is clearly shown by the fact that the word "day" is used without qualification in the earlier part of the statute as follows:

> "On routes carrying their whole length an average weight of mails per day of 200 pounds * * *."

Whereas when Congress came to prescribe the method of obtaining the average weight per day it limited the days which should be contained in the weighing period to "working days." If there had been no intention to differentiate between the word "days" and the words "working days" the word "days" would have been used in the latter part of the section. The fact that the word is used without qualification in one place in the statute and with qualification in another place in the statute absolutely precludes a construction of the act which, in effect, does away with the word "working" used in conjunction with the word "day."

> "Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning."
> Early *vs.* Doe, 16 How., 616.

As the phrase "working days" must be construed in determining what days shall constitute the weighing period, the common and ordinary meaning of the words will be those given to them by this court, in the absence of some custom or usage showing a contrary meaning. No particular custom or usage is claimed on the part of appellees for the term "working days," and there is no finding of fact or evidence in the case showing that the words "working days" have any peculiar or unusual meaning other than the ordinary and accepted meaning attached to the phrase.

> "The popular or received import of words furnishes a general rule for the interpretation of public laws as well as of a private and social transaction.
> Millard *vs.* Lawrence, 16 How., 251.
> Arthur *vs.* Morrison, 96 U. S., 108-109.
> Greenleaf *vs.* Goodrich, 101 U. S., 278-285.
> Caldwalader *vs.* Zeh, 151 U. S., 171-176.
> Glover *vs.* United States, 164 U. S., 294-297.

The Congress must be presumed to have intended to use language in its ordinary meaning, unless it would manifestly defeat the object of the provision.

Minor *vs.* Mechanics Bank, 1 Pet., 46.

The statute should be read according to the natural and obvious import of its language without resorting to subtle and forced construction, for the purpose of either limiting or extending its operation, and when the language is plain, words or phrases should not be inserted so as to incorporate in the statute a new and distinct provision.

United States *vs.* Temple, 105 U. S., 97.
United States *vs.* Graham, 110 U. S., 219.
United States *vs.* Hill, 120 U. S., 169-180.
United States *vs.* Lynch, 137 U. S., 280-285.
Houghton *vs.* Payne, 194 U. S., 88-100.

Webster's International Dictionary gives the following meaning to the words "working day": "A day when work may legally be done in distinction from Sundays and legal holidays."

The Century Dictionary gives the following meaning to the words "working day": "Any day on which work is ordinarily performed as distinguished from Sundays and holidays."

A similar construction has been placed upon the phrase "working day" by the Federal courts in their construction of charter parties.

Pederson *vs.* Eugster, 14 Fed., 422, and similar cases.

This meaning of the phrase as defined by the standard dictionaries and the decisions of the Federal courts in those cases involving charter parties is the commonly accepted construction of the words.

The reason that the words "working days" does not mean Sundays lies much deeper in the life of our country, how-

ever, than mere dictionary definitions or the decisions of the courts upon special definitions of phrases. It is based upon our religious beliefs. This court has never hesitated in its decisions in basing them upon the recognized religious tenets of our people.

In Church of the Holy Trinity *vs.* United States, 143 U. S., 457, this court held:

> "If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community. * * * There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in Updegraph *vs.* Com., 11 Serg. & R., 394, 400, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; * * * not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." And in People *vs.* Ruggles, 8 Johns., 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice, * * *. If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other

> matters note the following: * * * These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation." * * *

Even the Constitution of the United States in the proviso by which the chief executive is given ten days within which he may veto an act of Congress, excepts from such ten days, "Sundays."

The construction of the phrase "working days" ultimately rests upon the Fourth of the Ten Commandments which are the cornerstone of our religious beliefs:

> "Remember the Sabbath Day to keep it holy. Six days shalt thou labor and do all thy work; but the seventh is the Sabbath of the Lord thy God; in it thou shalt do no work."

That the days upon which work shall be done are the secular days of the week has been and is as firmly imbedded in the mind of every boy and girl of this country as that the sun will rise and set. The teachings of childhood become the rules governing the conduct of men, and subconsciously the members of Congress square the laws they make by their religious training, and so in this case they naturally excluded Sunday from the days which form the basis for determining the rate of pay under the act, and intended to make working days, which do not and never have meant Sunday, the basis for figuring the rate of pay on the purely commercial contracts of the United States for the transportation of mails. The fixed policy of the Government in this respect is further shown by the fact that Congress has never required the railroads to operate Sunday trains and the Post Office Department, in carrying out the acts of Congress, has never required the operation of Sunday trains by railroads. The very agreement upon which the present case is based

closed with a clause showing that payment for the transportation of the mails over the various routes can be obtained upon the carriage of them during 6 days in each week. The closing clause of the order on which payment is made for the transportation of mails reads as follows (Rec., pp. 42 and 43):

> "This adjustment is subject to future order and to fines and deductions and is based on a service of not less than 6 round trips per week."

From the above it would seem clear that "working days" meant week days or secular days and not Sundays. This was the construction placed upon the law by the Post Office Department from 1874 to 1884. This was the construction placed upon the law by the Department of Justice in 1884 and consistently followed by the Post Office Department from 1884 to 1905, and is not only not illegal, irrational, arbitrary or manifestly erroneous, but is the only logical construction that can be placed upon it.

If there should still be any doubt as to what Congress understood was meant by the words "working days" in 1905, when the act of 1873 was re-enacted, a careful reading of the following act, passed in 1900 and in effect in 1905, appellant believes will remove every vestige of doubt:

> "That letter carriers may be required to work as nearly as practicable only eight hours on each working day, but not in any event exceeding forty-eight hours during the six working days of each week; and such number of hours on Sunday, not exceeding eight, as may be required by the needs of the service; and if a legal holiday shall occur on any working day, the service performed on said day, if less than eight hours, shall be counted as eight hours without regard to the time actually employed."
>
> Act of June 2, 1900, chapter 613, section 1 (31 Stat. L., 257).

"The words of a statute—if of common use—are to be taken in their natural, plain, obvious, and ordinary signification. The legislative intent is to be sought for through this ordinary signification of common words; and if a contemporaneous construction of the same words by the legislature itself can be discovered, it is very high evidence of the sense in which the words are to be received."

Phila. and Erie R. R. Co. *vs.* Calawissa R. Co., 53 Pa. St., 20–60.

"Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first from the words they have used. If these are clear, we need go no further; if they are obscure or ambiguous, then the intent may have to be sought out by reference to the context, to previous or concurrent enactments, to the history of the art or trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms used."

Merritt *vs.* Welsh, 104 U. S., 694.

It therefore follows that the act of 1873, as amended and re-enacted, specifically directs the mode of ascertaining the average daily weight of the mails and in so specifying the mode directs that the weighing period shall consist of working days, and that the words "working days" do not include Sundays, and, therefore, the lower court erred in including in the weighing period Sundays and its decision should be reversed.

II.

Did Congress, by re-enacting in 1874 the act of 1873, adopt the construction theretofore placed upon the act and so remove any question of ambiguity that might theretofore have existed? Did Congress, by re-enacting in 1905 that portion of the act of 1874 defining the method by which

the average daily weight of the mails should be determined, adopt the construction placed upon the act from 1874 to 1905 and so remove any ambiguity that might theretofore have existed? Did Congress, by re-enacting in 1905 that portion of the act of 1874 providing the method by which the average daily weight of the mails shall be determined, after the act, at the request of the Post Office Department, had in 1884 been construed by the Attorney General, adopt the construction placed upon the act by the Attorney General and remove any ambiguity that might theretofore have existed?

That part of the act of 1873 which provides the method of determining the average daily weight of the mails is as follows:

> "The method of determining the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working ing days not less than 30, at such times * * *." (Rec., p. 50.)

No change was made in the wording of this part of the act regulating the compensation to be paid for the transportation of mails when it was re-enacted and made a part of the Revised Statutes in 1874. The wording of this part of the act remained the same until 1905, when this section of the statute was re-enacted as follows:

> "Provided, that hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct" (Rec., p. 52).

A comparison of the act of 1873 and the act of 1905 shows that no material change is made in the act of 1873 by the act of 1905, except that the minimum number of working days which constituted the weighing period was changed from 30 working days to 90 working days. The act remained in substance the same from 1873 to the date of the institution of this suit, and any construction placed upon the act of 1873 and the re-enactment thereof appearing in the Revised Statutes would equally apply to the subsequent re-enactment thereof in 1905.

> "It is a familiar canon of interpretation that all former statutes on the same subject, whether repealed or unrepealed, may be considered in construing the provisions that were retained in force."
>
> Veitervo *vs.* Friedlander, 120 U. S., 725.

Upon the taking effect of the act in 1873 it was, of course, necessary that the average daily weight of the mails should be ascertained in order that the rate of pay per mile per annum could be determined. It does not appear in the record that any difficulty was encountered at that time in determining the method to be pursued under the statute. Although the mails were weighed for two years by the railroads no question was ever raised, either by the Post Office Department or by the railroads, as to the method to be pursued in obtaining the average daily weight. No Post Office regulation appears by which a construction of the statute was made. We have, therefore, a rather remarkable situation existing during these two years, namely: the weighing of the mails by between 700 and 800 different railroads, each construing the act according to its own notion and each construing the act in exactly the same way.

The construction placed upon the act by the various railroad companies was that the mails should be weighed for 30 successive working days and that "working days" meant secular days and not Sundays, and if mail was carried on

Sundays the weight of such mail was added to the Monday weighing. The sums of the weighings so made were added together and divided by 30 (Rec., pp. 33 and 34). The construction so placed upon the act by the various railroad companies met no objection upon the part of the Post Office Department, and in 1875, when the law of 1873 was amended so as to require that the weighing of the mails be performed by the employees of the Post Office Department, the Post Office Department placed the same construction upon the act in making its weighings thereunder that had been placed upon it by the railroads (Rec., pp. 33 and 34). It should be borne in mind that the constructions placed upon the act by the railroad companies during their period of weighing and the construction placed upon the act by the Post Office Department upon the amendment of the act in 1875, were constructions placed upon the act within a short time after its passage and must be presumed to more clearly reflect the intention of Congress at the time of its passage than a construction placed upon the act at a much later date. From 1876 to 1884, without apparent hesitation or doubt as to what construction should be placed upon the act, the Post Office Department continued to apply the statute, and in doing so construed the words "working days" to mean secular days and not Sundays, and continued to add on those routes which carried mails on Sundays, the weight of Sunday mail to the Monday weighing. During this early period, from 1875 to 1884, it should be borne in mind that each and every year Congress passed an appropriation bill providing sums necessary to pay the yearly sums due for the transportation of the mails. Congress, of course, is presumed to have exercised ordinary care in its consideration of payments of public moneys to be made by the Post Office Department and to have been informed as to the construction placed upon the law under which these payments were made. This would be particularly true during this early period, because the law was at that time continually before Congress for amendment,

and the amendents proposed and passed reduced railway mail transportation pay under the act. In 1876 Congress reduced the maximum rates paid, by 10 per cent, and in the act so reducing the railway mail transportation pay provided for a commission to examine into the subject of the transportation of the mails by railroad companies. In 1877 this commission for examination of railway mail transportation was continued by act of Congress. In 1878 the maximum sums paid for railway mail transportation were further reduced 5 per cent. The question presented to Congress for its consideration from 1875 to 1879 was the compensation to be paid for railway mail transportation, and during these years it is apparent from the acts passed by it that careful consideration was given thereto. Congress determined that its manner of reducing railway mail transportation pay would be by reducing the maximum sum to be paid for railway mail transportation rather than by changing the method of finding the average daily weight of the mails. It could have followed either course but elected to leave the method of ascertaining the average daily weight as it was and to effect the reduction by lowering the maximum rate paid. It would pass the bounds of possibility to believe that Congress was not well informed as to the construction placed upon the act of 1873 by the Post Office Department.

> "It is presumed that the legislature is familiar with the law and the construction placed upon it."
>
> Sutherland Statutory Construction, vol. 2, p. 499.
>
> Board *vs.* Holliday, 150 Ind., 216.

From 1873 to 1884 the number of railroads operating Sunday trains became more numerous, and a change in the construction of the act to make working days include Sundays would have materially benefited the Government, and in 1884 order No. 44 was issued by the Postmaster General, which is as follows:

> *"Order No.* 44.—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day" (Rec., p. 44).

When order No. 44 was issued the then Postmaster General, having doubts either as to his power to change the wording of the statute by executive order or doubting whether the statute would bear such a construction, submitted the order to the Attorney General of the United States for an opinion as to its legality. The Attorney General in passing upon the legality of the order determined that it would be a departure from the law (Rec., pp. 35 and 36). Upon the rendering of the opinion by the Attorney General, order 44 was withdrawn, and from 1884 until 1905 those persons weighing mail for the periods of determining the average weight of mails per day continued to follow the construction placed upon the act from 1873 to 1884, as confirmed by the opinion of the Attorney General, and in doing so construed the words "working days" as meaning secular days and not Sundays, and where mail was carried on Sunday the weight of the mail so carried was added to the Monday weighing and Sunday was not included in the period during which the average weight was to be obtained.

Under the re-enactment of that part of the statute providing the method by which the average weight per day was to be obtained the Post Office Department continued to apply the same construction to the act as it had theretofore applied. At the time of the re-enactment in 1905 of that part of the statute under discussion the attention of Congress was directly called to the wording of the act and an effort was made to leave out of the act the words "working days," the following change being offered by the Committee on Post Offices and Post Roads:

> "*Provided*, that hereafter before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster General shall have the mails on such routes weighed and the average weight per day ascertained for a period of not less than three consecutive months" (Rec., p. 37).

It would indeed be difficult to find a clearer illustration of a long-continued construction being placed upon a statute than that heretofore outlined. Not only was a construction placed upon the act by the Department required to enforce it, but such construction was disputed and after full consideration was submitted to the Department of Justice. After such submission to the Department of Justice and an approval by it of the construction placed upon the act by the Post Office Department, the Post Office Department continued to interpret the act as it had theretofore done for a period of 21 years prior to the re-enactment of the act in 1905.

Since the decision in Stewart *vs.* Laird, 1 Cranch, 299, it has been the settled policy of this court to give great weight to a contemporaneous and long-continued construction of a statute by the executive officers who execute it. This policy, as illustrated by the language of this court in some of the later cases, is as follows:

> "The principle that the contemporaneous construction of a statute by the executive officers of the Government whose duty it is to execute it, is entitled to great respect and should ordinarily control the construction of the statute by the court, is so firmly embedded in our jurisprudence that no authorities need be cited support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."
>
> Pennoyer *vs.* McConnaughy, 140 U. S., 1.

The reasons underlying the policy were recently analyzed by this court in the case of United States *vs.* Mid-west Oil Company, 236 U. S., 459-473, as follows:

> "But government is a practical affair, intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but is the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

Unless, therefore, the construction placed upon the act by the Department is manifestly erroneous this court will, in construing the act, adopt the construction placed upon the act by the Department from 1873 to 1907. This long-continued construction of the act by the Department, with the yearly approval by Congress thereof, would seem to be almost conclusive as to the construction which should be placed thereon.

There are, however, further elements in this case which would seem almost to preclude further controversy as to the construction to be placed upon the act. The act of 1873 became effective March 3, 1873, and from that time the mails were weighed thereunder for a period of 30 working days, and Sunday was not included in working days. If mails were carried on Sunday the weight thereof was added to the Monday weighing.

The act of March 3, 1873, was repealed June 22, 1874, by section 5596 of the Revised Statutes, and the provisions thereof were re-enacted in section 4002 of the Revised Statutes. This repeal and re-enactment of the statute occurred one year and a half, approximately, after the statute went into effect, and during this time the statute was construed by those who

were required to weigh the mails. It is presumed that Congress knew the construction placed upon the act by those persons weighing the mails, and in re-enacting the statute of 1873 Congress will be presumed to have adopted the construction placed upon it prior to that time.

> United States *vs.* Cerecedo Hermanos y Compania, 209 U. S., 337:
>
> "Counsel for the government also points out that the provisions of the tariff act of 1875 and subsequent acts were substantially similar to paragraph 296, and that the Treasury decisions thereunder were in accordance with the interpretation for which the government now contends. * * * We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution. * * * And we have decided that the re-enactment by Congress, without changes, of a statute which had previously received long-continued executive construction, is the adoption by Congress of such construction."

In 1905 Congress substantially re-enacted that part of section 4002 of the Revised Statutes which is now under consideration. From 1874 to 1905 the statute had been construed by the Department whose duty it was to carry it out. During each of these years the statute had received the particular attention of Congress at the time of the annual appropriation bill. Moreover, during this period there had arisen the dispute as to the proper construction of the act. Under these circumstances Congress will be presumed to have adopted the construction placed upon the act by the Department prior to its re-enactment in 1905.

> "And again, when, for a considerable time a statute notoriously has received a construction under practice from those whose duty it is to carry it out, and afterward is re-enacted in the same words, it may be pre-

sumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."

Copper Queen Consold. Min. Co. *vs.* Arizona, 206 U. S., 474-479.

"We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

N. Y., N. H. and H. R. Co. *vs.* Interstate Com. Comm., 200 U. S., 361-401.

This statute has not only been re-enacted once, but twice, and each time after it had been construed by the Department called upon to enforce it. The construction placed upon the act prior to re-enactment in both instances was the same. The rule, therefore, that by re-enactment Congress adopts the previous construction placed upon the act is doubly operative in this case and would seem to almost absolutely preclude a change in construction.

There is still another element, even more strictly determinative of the construction to be placed upon the act than any heretofore discussed. In September, 1884, the then Postmaster General issued the following order:

"*Order No.* 44.—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day." (Rec., p. 34.)

October 22, 1884, the then Postmaster General addressed the following letter, the material parts of which are given, to the Department of Justice of the United States:

"SIR: The act of March 3, 1873, 17 Stat. L., p. 558, regulating the pay for carrying the mails on railroad routes, provides:

" 'That the pay per mile per annum shall not exceed the following rates, namely:

" 'On routes carrying their whole length an average weight of mails per day of 200 pounds, $50; * * *

" 'The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty.' " * * *

"Upon a large number of the railroad routes mails are carried on six days each week—that is, no mail is carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1873 in arriving at the average weight of mails per day on these classes of service to treat the 'successive working days' as being composed of six secular or working days in the week, which is explained in the following illustrations:

"Two routes, Nos. 1 and 2, over each of which 313 tons of mail are carried annually.

"On route No. 1 mails are carried twice daily, except Sunday, six days per week, and are weighed 30 successive working days, covering usually a period of 35 days. The result is divided by 30, and an average weight of mails per day of 2,000 is obtained.

"On route No. 2 mails are carried twice daily, seven days per week and weighed for 30 successive working-days, and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing as before covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 pounds is obtained.

"I have thought it necessary to give the foregoing illustrations in order that the practice of this Department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute.

"If not in conformity with the law, will you please

indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,
"Postmaster General."

(Rec., pp. 34 and 35.)

October 31, 1884, the Department of Justice gave the following opinion upon the construction to be placed upon the method of obtaining the average weight per day of the mails:

"The Postmaster General.

"SIR: I have considered your communication of the 22nd instant requesting to know whether the construction placed by the Post Office Department on section 4002, subsection 2, prescribing the mode in which the average of the weight of mails transported on railroad routes shall be ascertained is correct, and am of the opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"WM. A. MAURY,
"Acting Attorney General."

(Rec., pp. 35 and 36.)

It would indeed be difficult to more clearly present the question at issue in this case than it is presented in the letter of the Postmaster General of October 22, 1884. In paragraph 4 of the letter that part of the act to be construed is set up in the language of the statute. In paragraph 5 the Postmaster General points out that on some routes mail is carried 6 days in the week and on some routes mails are carried 7 days a week, and expressly states that on those routes on which mails are carried 6 days in the week, the day upon which mail is not carried is Sunday. In paragraph 6 the construction of the Department of the words "working days" is clearly set forth, it being stated that successive working

days had been treated by the Department as meaning 6 secular days. In paragraph 8 the method followed on routes over which mail is carried 6 days in the week is specifically set forth. In paragraph 9 the method followed on routes over which the mails were carried 7 days in the week, is specifically set forth, and it is pointed out that the mail carried on Sunday is treated as if carried on Monday.

The letter clearly and specifically asks whether the phrase "successive working days" means 6 secular days, and this is the question which is presented in this case.

The anwer of the Department of Justice is equally clear, stating that the construction placed by the Post Office Department on the mode in which the average weight of mails is to be ascertained under section 4002 is correct and a departure from it would defeat the intention of the law. It would be impossible to put the question in a clearer form or to answer the question more definitely. This interpretation of the act by the Department of Justice was followed by the annual appropriation bill covering the railway mail compensation for 1884 and each successive year up to and including 1905. The method by which the compensation for railway mail transportation was figured was annually presented to Congress and was constantly before it for consideration.

This court has held that when prior to re-enactment the Department whose duty it is to enforce a statute has submitted the construction of the statute to the Department of Justice and a construction is placed by it thereon, that Congress will be presumed, in re-enacting the law, to have adopted the construction theretofore placed upon the act by the Department of Justice.

> "The Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with

> the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require, as the basis of duty, the weight of the merchandise at the time of entry, instead of its weight at the time of its withdrawal from warehouse."
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> United States *vs.* Falk, 204 U. S., 143–152.

This is but another form of stating that when the words of a statute are subject to more than one construction, and the question of what is the proper construction has been raised by the Department required to enforce the law and presented by it to the Department of Justice for an opinion, and the Department of Justice has determined which of several constructions is the proper construction, then Congress, by a subsequent re-enactment of the statute without substantial change in the language, is presumed to have taken into consideration the claimed ambiguity in the wording used and the construction placed upon it by the Department of Justice, and to have adopted, by re-enactment, the construction placed upon the statute by the Department of Justice.

Perhaps a clearer statement of the rule is this: the presentation to the Department of Justice by the Department required to enforce the statute, of the question of the proper construction thereof, raises directly the determination of the meaning of the act; the placing of one construction on the act by the Department of Justice excludes a construction conflicting therewith; Congress, at the time of re-enactment, has knowledge that the wording of the act has been considered capable of two or more constructions and that a definite construction has been placed upon the act; it is, therefore, logically held that if Congress desired or intended any other meaning to be placed upon the act than that placed upon it by the Department of Justice, it would indicate its intention by changing the wording of the act, and by not so

doing shows clearly that the statute has but one meaning, which is that placed upon it prior to the re-enactment.

The present case clearly illustrates the principles involved. There were two classes of railway mail transportation; in the first class mails were transported 6 days in the week exclusive of Sunday; in the second class mails were transported 7 days in the week. The statute provided a method for obtaining the average daily weight of the mails, which had been construed as providing one method, which was equally applicable to both classes of railway mail transportation without change. The question was raised as to the correctness of the construction placed upon the act as applied to the first class and its correctness as applied to the second class. The Post Office Department presented these facts to the Department of Justice, and in so doing directly raised the question as to whether the words "working days" appearing in the statute meant secular days in determining the average weight of the mails carried on the first class and whether the words were to be construed in the same way in determining the average weight of mails on the second class. The Department of Justice construed the statute as meaning that the words "working days" meant secular days in determining the average weight of mails on both classes. The opinion of the Department of Justice, until superseded by a court decision or by act of Congress, fixed the meaning of the words construed, removing any question of ambiguity. Of this Congress knew and by using the words construed by the Department of Justice when re-enacting the statute, confirmed the construction placed upon them, and the statute comes before this court free from any question of ambiguity that might have existed prior to the re-enactment of 1905.

This case presents a remarkable series of facts bearing upon the construction to be placed upon that part of the act providing the method of ascertaining the average daily weight of the mails; first, there is a long-continued departmental construction, extending over a period of 34 years;

second, there is a construction of the act extending over a period of 1 year and a half, and then a re-enactment of the act by Congress, and following this is a departmental construction of the act for a period of 30 years and a re-enactment of the act; third, there is a departmental construction of the act, a presentation of this departmental construction to the Department of Justice for its opinion thereon, an opinion of the Department of Justice confirming the departmental construction as being the proper and legal construction and a re-enactment of the act by Congress after the rendering of the opinion by the Department of Justice. The first of these facts, unless the construction placed upon the law by the Department was erroneous, would, under the decisions of this court, control the construction to be placed upon the act. The second of these facts would, under the decisions of this court, remove all doubt as to whether the construction placed upon the act by the Department was erroneous, it being the province of Congress to determine the method to be pursued in obtaining the average weight of the mails, and by re-enactment Congress would show that the construction placed upon the act was not erroneous and that the method followed in obtaining the average weight of the mails was that intended by Congress.

The third fact would remove absolutely any question of ambiguity in the statute and would definitely fix the meaning of the statute as being that placed upon it by the Department of Justice prior to re-enactment, unless such construction was illegal, which is not claimed in this case.

It would therefore appear that under the decisions of this court, the act of 1905 is open to but one construction, namely, that in obtaining the average daily weight of the mails the mail should be weighed for a period of not less than 90 successive working days, and that Sundays should not be included within such weighing period, and the weight of the mail carried on Sunday should be added to the Mon-

day weighing, and that the lower court erred in not so holding.

III.

What, if any, discretion, did the Postmaster General have under the general law and under the act of 1873, as amended and re-enacted, to determine the method to be pursued in obtaining the average daily weight of the mails?

Neither the Post Office Department nor the office of Postmaster General is created by the Constitution of the United States. Both are created by act of Congress, under the authority given to Congress in the Constitution of the United States "to establish post offices and post roads." In construing, therefore, the authority of the Postmaster General it is necessary to always bear in mind that the power of the Postmaster General is not derived from the Constitution of the United States and is not equal to or coextensive with that of Congress, but is only that conferred by Congress.

> "The office of Postmaster General is not created by the Constitution, nor are its powers or duties marked out by that instrument. The office was created by act of Congress; and wherever Congress creates such an office as that of Postmaster General, by law, it may unquestionably, by law, limit its powers, and regulate its proceedings; and may subject it to any supervision or control, executive or judicial, which the wisdom of the Legislature may deem right. There can, therefore, be no question about the constitutional powers of the executive or judiciary in this case."
>
> Kendall *vs.* United States, 12 Pet., 524–626.

The authority, therefore, of the Postmaster General to act in any given case must be derived from specific acts of Congress, for from no other source can he, being the creature of Congress, derive power. Congress, in creating the office of

Postmaster General, specifically set forth the duties of the office. Section 396 of the Revised Statutes provides:

> "Sec. 396. It shall be the duty of the Postmaster General: * * * Ninth. To superintend generally the business of the Department and execute all laws relative to the postal service."

And by sections 158 and 161 of the Revised Statutes Congress authorizes the Postmaster General to prescribe regulations, and expressly limits his authority to regulations consistent with the law.

> Section 161. "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Section 161 only states in plain and unequivocal language that which is the law. As the power of the Postmaster General is derived from Congress, no regulation of his could supersede or change a regulation made by Congress. There is no general authority granted to the Postmaster General to act independently of Congress; his action must always be consistent with the directions given him by Congress.

The tendency of executive officers to attempt to modify or annul statutory regulations by regulations of their own, which they think serve better the purposes of government than the regulations prescribed by Congress, is exemplified by the following cases:

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of

> the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a Treasury regulation."
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> Morrill *vs.* Jones, 106 U. S., 466.

> "The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court."
>
> United States *vs.* Symonds, 120 U. S., 46.

These are but two of many cases which have defined the limits of departmental regulation. The rule could not be different, for otherwise the Department would be superior to Congress. The following language of this court fixes the limits of departmental regulation:

> "If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was

certainly not intended to be conferred upon the Secretary."

United States *vs.* United Verde Copper Co., 196 U. S., 207–215.

The general authority of the Postmaster General to execute the laws should not be confused with the power to define the terms of a law. The first authority he has; the second authority has never been granted to him. He cannot change a law or put a construction thereon which the law itself does not bear. The appellee would extend the general authority of the Postmaster General to superintend the business of the Department and execute the laws, to also cover the power to define and abridge the terms thereof, but cites neither statute nor authority to support this contention; nor can such authority, either statutory or judicial, be found, for the contention is erroneous. This part of the appellees' argument is manifestly fallacious, as it would give to the Postmaster General legislative power.

It, therefore, follows that the power of the Postmaster General to issue regulations is not general or unlimited, but is expressly limited by the provisions of the acts of Congress. The issue in this case turns upon regulation 412 of the Post Office Department, which directs the method of obtaining the average daily weight of the mails under the act of 1873 as amended and re-enacted. The authority, therefore, of the Postmaster General to issue the order depends upon whether it was consistent with the law at the time it was issued. The question presented is: Is order No. 412 inconsistent with the law as enacted by Congress The statute is clear as to the authority given to the Postmaster General to readjust compensation to be paid for railway mail transportation. This authority is expressly limited to the conditions and rates mentioned in the act. As any other condition or rate than that specified in the act would be inconsistent with the authority granted to the Postmaster General, it is apparent that

the Postmaster General cannot change the conditions or rates mentioned in the act. The conditions of railway mail transportation are not at issue in this case, and it is therefore not necessary to discuss the statutory provisions concerning them. The statute provides the basis of pay for railway mail transportation. This sum is based upon the average weight of mails per day carried per mile per annum. The exact wording of the statute being:

> "And that the pay per mile per annum shall not exceed the following rates, namely, on routes carrying their whole length an average weight of mails per day * * *."

No discretion is given to the Postmaster General to change this mode of determining the pay for railway mail transportation, and any regulation issued by him providing for another or a different mode of obtaining the pay for railway mail transportation would be inconsistent with this provision and void; that is, the Postmaster General could not make the pay for railway mail transportation depend upon the monthly average of mails carried or in any other way change the method provided by the statute. The statute does fix the maximum sums to be paid for railway mail transportation after the average weight per day per mile has been determined, and leaves with the Postmaster General authority to pay a less sum than the maximum sum. This authority to pay a less sum than the maximum sum is distinct from an authority to determine the mode in which the average weight of mails per day per mile per annum is to be determined and should not be confused therewith. No authority is given to determine the mode; limited authority is given to fix the amount of pay per mile per annum. The statute further fixes the method of determining the average weight of the mails, the exact wording of the statute being as follows:

> "The average weight to be ascertained in every case by the actual weighing of the mail for such a number of successive working days, not less than 30, * * *."

This section clearly prescribes the method of obtaining the average weight per day of the mails and gives to the Postmaster General no discretion as to the method to be employed. It does give him limited discretion to determine the maximum number of working days to be included in the weighing period. The statute is uniform in providing the unit to be used in determining the pay of railway mail transportation and the unit to be used in determining the average daily weight of the mails and also is uniform in leaving to the Postmaster General a limited discretion in fixing in one instance the amount to be paid per unit after the unit has been determined and in the other instance in leaving to the Postmaster General a limited discretion in determining the number of units, not the kind, to be included in the weighing period.

> "*Expressio unius est exclusio alterius* is a universal maxim in the construction of statutes."
>
> United States *vs.* Arrendondo, 6 Pet., 691–725.

By leaving to the Postmaster General limited authority to fix the amount of railway mail transportation pay after the average weight of mails per day per mile per annum had been determined, Congress clearly indicated that it intended to leave no other element therein to the discretion of the Postmaster General. By leaving to the Postmaster General limited authority to fix the number of units composing the weighing period, Congress clearly indicated that it did not intend to leave to the discretion of the Postmaster General any other element of the method of determining the average weight of the mails.

It therefore follows that the Postmaster General had no authority to change or nodify the method provided in the statute of determining the average daily weight of the mails except as he might increase the number of working days

comprising the weighing period. He had no power to change the kind of day to be included in the weighing period, and as the statute directs that the weighing period shall consist of "working days" he could not include in the weighing period other days than working days, by departmental regulation or order.

If, therefore, the ordinary meaning of the words used in the statute prescribing the method by which the daily average weight of the mail shall be obtained is given to them, and this court holds that the weighing period provided for in the statute shall consist of secular days and not Sundays, then order No. 412, which provides that the weighing period shall consist of Sundays as well as secular days, is inconsistent with the statute and is null and void.

If this court holds that by re-enacting the provision by which the method of determining the average daily weight of the mails was provided, Congress adopted the construction theretofore placed thereon by the Post Office Department and the Department of Justice, under which the weighing period was determined to consist of secular days and not Sundays, then order 412, which provides that the weighing period shall consist of Sundays as well as secular days, is inconsistent with the statute and is null and void.

IV.

Is appellant estopped from caiming compensation under the statute for carrying the mails because it, after protest, carried the mails and accepted pay therefor based upon Order No. 412?

Appellee contends that appellant is estopped from claiming compensation under the statute, and bases its contention upon the cases of:

Eastern Railroad Co. *vs.* United States, 129 U. S., 391.

C. M. and St. P. Ry. Co. *vs.* United States, 198 U. S., 385.

A. T. and S. F. Ry. Co. *vs.* United States, 225 U. S., 64.

In the case of Eastern Railway Co. *vs.* United States, *supra*, the facts are materially different from those in the case at bar; first, no question arose in that case as to the legality of the order issued by the Postmaster General making the reduction in the pay for transporting the mail; the order so issued was in accordance with the terms of the act of 1878; second, no protest was made by the railway company objecting to the pay received thereunder by it; third, the railroad was not a land-grant railroad and was not compelled to carry the mails. A change in any one of the above facts would be sufficient to take this case out of any rule established by the former case. It should be noted, however, that no rule as to estoppel, as claimed in this case, was established by the Eastern Railroad Co. case. The court first determined that the Postmaster General could legally make the reduction in the rate of pay, and thus recognized the necessity of first determining the legality of the action of the Postmaster General before considering the question of estoppel, and then held that inasmuch as the action of the Postmaster General was legal, an estoppel would arise as to the railroad company by an acceptance of pay for the transportation of the mail without protest. This distinction is recognized in the case of

D., L. & W. Ry. Co. *vs.* United States, 249 U. S., 385.

In the case of C., M. and St. P. Ry. Co. *vs.* United States, *supra*, the facts are not similar to those in the case at bar in that; first, no protest was made against the order of the Postmaster General under which the railroad received pay for railway mail transportation; second, that the railroad was not a land-aided railroad and was not compelled to carry the mails. A change in either one of these facts would take the present case out of any rule established in the former case. The remainder of the facts in the former case are similar to those in the present case. An order was issued by the Post Office Department which the railroad claimed was contrary

to the terms of the statute and insisted that it should be paid for the transportation of the mail under the terms of the statute. It should be noted that the court first determined that the order issued by the Postmaster General was within his power under the statute and was not illegal, thus recognizing the necessity of first determining the question of the legality of the action of the Postmaster General, and then discussed the question of estoppel.

In the case of the A., T. & S. F. Ry. Co. *vs.* The United States, *supra,* the facts are not similar to those in the case at bar, in that the railroad in that case was not a land-aided railroad and was not compelled to transport the mail. A protest was made in that case against the order of the Postmaster General, by which it was claimed that the order was in violation of the statute and that the railroad should be paid for the transportation of the mails under the statute. It should be noted that the court determined, first, that the order complained of was within the terms of the statute and the authority of the Postmaster General, thus recognizing the necessity of first determining the legality of the action of the Postmaster General, and then discussed the question of estoppel.

In all three of the cases the court first determined whether the order complained of was legal or illegal and then passed upon the question of estoppel. This would necessarily be so, for the reason that the statute regulating railway mail transportation is a part of any contract, express or implied, existing between the railroad companies and the Government. If the facts herein establish an express contract then the statute is a part thereof. If the facts herein establish an implied contract, then the terms of the statute will govern the consideration to be paid.

> "Where an agent is appointed by law to contract for the State, the law under which he acts is as much a part of the contract made by him as if it were formally embodied in the contract."
>
> 36 Cyc., 872.

"Provisions of law applicable to the subject-matter of contracts are parts of the contract, whether so expressed or referred to or not.

"Where a law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts provided for the public service."

State *ex rel.* Ellis *vs.* Tampa Water Works, 56 Fla., 858-871.

"Our statute books are filled with acts authorizing the making of contracts with the Government through its various officers and departments but, in every instance, the person entering into such contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law."

Pierce *vs.* United States (The Floyd acceptances), 7 Wall., 666-680.

The cases first cited are all authority for the consideration by this court of the question raised in this case as to the legality of order No. 412.

If this court finds that order 412, issued by the Postmaster General, was in accordance with law, then there is an end to this case. If this court finds that order 412 is inconsistent with the act of 1873, as amended and re-enacted, then no estoppel could arise, for the reason that the terms of the act would govern the compensation to be paid appellant for railway mail transportation.

In any event, no estoppel arises as to appellant, for the reason that it is a land-aided road and was compelled to transport the mails.

V.

The Post Office Department, in finding the average daily weight of the mails under order No. 412 on six-day routes, included in the weighing period, which was the divisor, Sundays, upon which no work was done. In so doing there

was a direct violation of the statute, for under the broadest construction of the words "working days", days upon which work was not done, could not be included in the weighing period. There could be, on six-day routes, but 90 working days in 105 successive days. In including in the weighing period the 15 Sundays upon which mail was not carried and was not weighed, the Post Office Department reduced the average daily weight of the mails carried by one-seventh and appellant's compensation by an equal amount. Unless this court reads out of the statute the word "working" it would seem clear that the case must be reversed as to the compensation to be paid appellant on six-day routes and therefore no further discussion of this point would seem necessary.

VI.

An analysis of the opinion filed herein in the court below as determining the following questions:

1. **The construction of the words "working days."**
2. **The effect to be given to the reenactment of 1905.**
3. **The authority of the Postmaster General.**
4. **Is the statute directory or mandatory?**
5. **Is appellant estopped from recovering in this case by its receipt of pay for railway mail transportation? (This has been fully considered in section IV of this brief.)**

The opinion of the lower court does not contain a construction of the words "working days." It apparently assumes, without consideration, that the words "working days" mean any day, including Sunday. It does not dispute that the commonly accepted meaning of the words does not include Sundays but includes secular days only. It sets forth no reason why the ordinary meaning of the words should not be attached to them in the act in question. Without such an explanation the entire opinion is without foundation, for, as is admitted in the opinion itself, the Postmaster General

had no authority to construe the law and necessarily no authority by construction to change the law.

> "Their contention leads to the conclusion that the Postmaster General gave an authoritative and final construction of the statute. This, we think, is beyond his power. The statute does not confer the power of legislation, nor can the exercise of the power have the effect of legislation" (Record, p. 71).

The court adopts a strained construction for the words without giving any reason therefor. The opinion passes, without comment or discussion, the first important question in this case, and then having adopted an unreasoned premise, proceeds to build an argument thereon. The opinion, therefore, is without weight until it is determined what is the meaning of the words "working days." If this court gives to the words their ordinary meaning, then, under the opinion of the lower court, which in this respect is sound, the Postmaster General would have no power, by rule or regulation, to change the meaning of the words, and order 412 would be illegal and void.

The second element to be disposed of is the effect to be given to the re-enactment in 1905 of that part of the act of 1873, providing the method by which the average weight of the mail per day should be determined. The opinion of the lower court nowhere confutes the following facts: that from 1873 to 1884 no question had arisen as to the meaning of the act of 1873, and the Post Office Department had interpreted the act to mean that only secular days were to be included in the weighing period; that after the opinion of the Attorney General was rendered in 1884 and up to the time of the re-enactment of the law the same interpretation had been placed upon the act; that Congress was presumed to know the interpretation that had been placed upon the act. The lower court recognizes that this court has held that by the re-enactment of an act Congress adopts the interpretation

theretofore placed upon the act. The lower court could not come to any other conclusion, for the cases upon this branch of the law are too clear and certain to avoid admitting the rule as established by this court. The lower court picked three cases which dealt with the Treasury Department (Rec., p. 73), and then claimed (Rec., pp. 73-74) that all the cases establishing the rule above set forth were cases dealing with the Treasury Department, and that the rule was limited to cases involving the Treasury Department. The power and authority of the Secretary of the Treasury and of the Treasury Department springs from identically the same source that the power and authority of the Postmaster General and the Post Office Department springs from. In the same section the Constitutional Congress is authorized to legislate regarding each of these Departments. The rules of law, therefore, governing the construction of the acts of Congress giving authority to the Secretary of the Treasury and the Postmaster General would be the same. If, therefore, it was the fact that the decisions of this court were confined to decisions dealing with cases arising in the Treasury Department, nevertheless, such cases would be authoritative for cases arising in the Post Office Department. It is not, however, the fact that all the cases cited by appellant to support its claim, that Congress by re-enactment adopted the construction theretofore placed upon the act, arose as to action taken by the Treasury Department. On the contrary, the rule so stated is of general application, as note the cases heretofore cited of N. Y., N. H. & H. R. Co. *vs.* Interstate Commerce Commission, *supra;* Copper Queen Consolidated Mining Co. *vs.* Arizona, *supra.* The first of these cases applies the rule to the Interstate Commerce Commission, and in it this court recognizes the rule as being applicable to all laws passed by Congress. The second case applies the rule to the adoption by one State of a statute from another State, and holds that the construction placed upon the statute in the State from which it is adopted is the construction which is to be placed upon the statute in the

adopting State. To uphold the decision of the lower court as to the effect of re-enactment, where there has been a previous construction of the act re-enacted, will reverse a well-established principle of law recognized by this court and will change the same rule, based upon the decisions of this court, in practically every State in the Union. To uphold the decision of the lower court this court must reverse the long line of authorities holding that by re-enactment Congress adopts the construction theretofore placed upon the act upon which many property rights rest. There is no element in this case which makes it an exception to the general rule.

The third element to be disposed of is the authority of the Postmaster General. As has heretofore been shown in this brief, the authority of the Postmaster General is derived from acts of Congress, and therefore any authority that is claimed for him must be based upon existing acts of Congress. The opinion of the lower court speaks of the general authority vested in the Postmaster General by Congress, but fails to point out the specific acts of Congress by which this general authority is granted to the Postmaster General. In the absence of any act granting general authority it would not be presumed that any such authority existed. Moreover, as to railway mail transportation, this court has recognized that the authority of the Postmaster General is not a general authority, but is limited by the terms of the act.

> "The section does not sustain the appellant's contention. The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitations on its exercise, expressed in section 4002, is as to the manner of ascertaining the rate, which is to be by the average weight of the mails."
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> C., M. & St. P. Ry. *vs.* United States, 198 U. S., 385-389.

It therefore follows that the lower court erred in holding that the Postmaster General had general authority as to the manner of ascertaining the rate. Such authority is limited by section 4002 of the Revised Statutes, which is that part of the act of 1873 providing the method of obtaining the average daily weight of the mails.

The opinion of the lower court is based upon the theory that inasmuch as the Postmaster General had authority to interpret the act at one time he must necessarily have equal authority to change the interpretation of the act whenever he thought it advisable so to do. This appears clearly on page 66 of the record in the following language of the opinion:

> "It is clear that if the law permitted him to adopt a course of action which to him seemed just the original adoption of it or the continuance of the usage could not take away or limit the right, duty, or powers of his successors to act independently when in their wise discretion changed conditions seemed to warrant a change in the usage. Charged with the same or similar duties and responsibilities, his successors were vested with the same powers he had. Usage alone would not make it mandatory, and, except that a change in the usage would not be allowed to affect the rights acquired under a previous usage, its alteration cannot be prevented by parties whose claims arise after full notice of the change."

This part of the court's opinion shows the difficulty the lower court faced in supporting the legality of Order No. 412. The court could not and did not question the correctness of the interpretation placed upon the act prior to 1907. The opinion is not based upon the wording of the act or the intention of Congress. The court recognizes that as conditions existed from 1873 to 1907 the proper interpretation of the act was that claimed by appellant. It rests its opinion upon the fact that the increase in routes upon which mail was carried upon Sunday was very great between 1873 to 1907,

and that therefore the interpretation of the statute should be changed:

> "In the hearing before a congressional joint committee in 1914, it is shown that in 1873 there were 684 six-day routes and only 97 seven-day routes. The aggregate mileage of the first class was then approximately 48,000 miles and of the latter 15,000 miles. The annual pay to the six-day routes was approximately four and three-quarters millions and to the seven-day routes it was approximately two and a half millions of dollars. Charged with the duty mentioned the Postmaster General found the daily average weights, as has been stated, and his action was followed until 1907. When he came to consider the situation in 1907 he found, instead of 684 six-day routes as in 1873, that they had increased to about 1,394 in number, with an aggregate mileage of about 49,000 miles, while the seven-day routes had increased in number from 97 in 1873 to about 1,600 in 1907, with an aggregate mileage of 153,000 miles. While, therefore, the six-day routes about doubled in number in the 34 years, the seven-day routes had increased by about 16 times their number during the same period. * * *
>
> "If by the act of 1905 there was to be a longer period of weighing by which to get, as was supposed, a fairer average of weights, and only one divisor was to be used, it cannot be reasonably affirmed that a fairer average is not attained when, considering all the routes, the basis is laid upon the class which is greatest in number and handles the larger weights." (Rec., p. 72.)

The desirability of a change is not based upon any inconvenience that resulted from changed conditions in obtaining the weight of the mails; the method followed in obtaining the weights is identically the same under Order 412 as was followed prior to the issuance of the order. The opinion does not proceed upon the idea that Order 412 simplified former methods or made applicable to present condi-

tions an antiquated method of obtaining the weights. The opinion recognizes that the sole purpose of the order is to reduce by departmental regulation the amount of money paid for railway-mail transportation. If changed conditions make the application of an act of Congress irrational or unjust, it is the province of Congress to change the law so that it will apply to changed conditions and is not within the power of the Department to effect a change by departmental regulation.

> "Perhaps Congress may have acted under a mistaken idea, that color would always indicate quality. Perhaps, up to the time that the law was passed, as the processes of manufacture had been conducted, color was an approximate or general indication of quality. Suppose this to be so, does it derogate from the fact, that color was the standard which Congress, with the lights which it had, saw fit to adopt? Does it not tend to fortify that fact? If it be found by experience that the standard is a fallacious one, can the Executive Department supply the defects of legislation? Congress alone has the authority to levy duties. Its will alone is to be sought."
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> Merritt *vs.* Welsh, 104 U. S., 694.

It therefore follows that that part of the lower court's opinion, which bases the authority of the Postmaster General to effect a change in the law by departmental regulation upon changed conditions, is manifestly erroneous.

The fourth element upon which the opinion of the lower court is based is that the statute of 1873 as amended and re-enacted is directory and not mandatory and that therefore the Postmaster General could take such action under it as to him seemed best. The character of the act has been discussed in section 1 of this brief, but as it was there discussed from a somewhat different angle than the court treats it, a further consideration of the question may throw light thereon.

The cases cited by the lower court to support that part of its opinion which holds that the act was directory, sustain

the general rule that the act must be examined to ascertain the intention of the legislature. The lower court does not analyze the statute, but contents itself with the statement that the act is directory. A consideration of the statute itself, appellant believes, will negative the opinion of the court. The statute "authorizes and directs" the Postmaster General "to readjust the compensation hereafter to be paid for the transportation of mails * * * upon the conditions and at the rates hereinafter mentioned," and then provides "that the pay per mile per annum shall not exceed the following rates, namely; on routes carrying their whole length an average weight of mails per day of 200 pounds, $50; * * * the average weight to be ascertained by the actual weighing of the mails for such a number of successive working days, not less than 90 * * *."

Is the act mandatory or directory? Did the Postmaster General have to readjust the compensation for the transportation of the mails or did he not? It is submitted that after the passage of the act, the Postmaster General had no discretion as to readjusting the pay for railway mail transportation. The act not only authorized him to do so but directed him to do so. It is apparent from the wording of the act that generally the act is mandatory and not directory. It then remains to be considered whether the provisions of this generally mandatory act are in part directory. With the conditions of railway mail transportation we are not interested. With the rates of railway mail transportation pay we are interested. We note that the word in that sentence prescribing the rate per mile per annum to be paid by the Postmaster General, which indicates whether he can exercise discretion as to the amount to be paid, is the word "shall." The statute reads "the pay per mile per annum shall not exceed * * *," and so an implication would arise that this part of the act is mandatory and not directory. Furthermore, the act itself fully confirms this implication, and we do not think it can be contended that the Postmaster

General could pay more than the maximum rates prescribed by the statute. It is also to be noted that in re-enacting in 1905 that part of the law providing the method by which the average weight is to be ascertained the word "shall" is used, and so the same implication arises as to the mandatory character of that part of the act providing the method of ascertaining the average weight of the mails, there being no substantial change in the wording of the act. In the act of 1873 that part of the statute providing the method by which the average weight was to be obtained was part of that part of the sentence providing the rate to be paid and so was governed by the word "shall" as used in the first part of the sentence. The act of 1905, however, by using the word "shall" with respect to the method of obtaining the average weight, removes any question as to the implication arising as to the character of this part of the act. We do not presume that it will be contended on the part of the appellees that the Postmaster General could make the weighing period consist of less than 90 days, and therefore in this respect the act is mandatory. We do not believe that it could be seriously contended that that part of the act requiring the weighing period to consist of "successive" working days is directory and not mandatory, and that the Postmaster General could select Tuesdays and Wednesdays as being the days which should compose the weighing period, or Sundays as being the days which should compose the weighing period, or in any other manner change the successive character of the days which would compose the weighing period. As to this feature of the act it seems to be apparent that the weighing period had to be a continuous one of the days required, and the Postmaster General had no authority to select here a day and there a day in making up the weighing period. If the above analysis is correct, the only part of the act prescribing the rate to be paid, which under any circumstances could be directory, is that part of the act specifying the kind of days which should compose the weighing period, and we

respectfully submit that inasmuch as the statute makes no distinction as to the elements composing the method of ascertaining the average daily weight of the mails that it was not the intention to make the provisions generally mandatory and one only directory. It is also called to the attention of the court that the language, "successive working days," is a phrase and that if part of the phrase is mandatory all of the phrase is mandatory, and one word could not be picked out from the phrase and the act, as to that word, held to be directory. It is, therefore, submitted that an analysis of the act itself does not sustain the opinion of the lower court, that the act is directory and not mandatory, but on the contrary shows clearly that the act is a mandatory act.

An analysis of the various cases cited by the lower court in support of its contention that the act is directory will show that in each and every case the act which is found to be directory did not deal directly with the matter in issue but with some collateral matter, and that in almost every case the court decides that the act held to be directory was not part of the contract which was in issue. The courts recognize that where the execution of the act, the performance of which is claimed to be directory, affects directly the rights of third persons, and is not an act provided simply for the convenience of Government officials in executing some law, that then the law is in all cases mandatory. The case of

United States *vs.* De Visser, 10 Fed., 642–648,

cited by the lower court as upholding its contention as to the character of the act, clearly recognizes this distinction, as note the following language appearing on page 648 of the opinion:

> "But, on the other hand, statutes which are not designed to affect the rights or liabilities of third parties, but are designed only to direct the officers of the Government in the performance of their duties

for its own protection and security merely, are construed as directory to them only, and as not creating any obligation to the surety in the bond, nor as forming any part of the contract of Government with him."

"There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

French *vs.* Edwards, 80 U. S., 506.

In the present case, if the act is executed according to the construction placed upon it from 1873 to 1907, one sum is paid to the railroads; if the act is executed according to the construction placed on it under Order No. 412, a greatly reduced sum is paid to the railroads. The act therefore would be mandatory, for a change in its construction materially affects the rights of third persons, namely, the railroads. It would seem that the lower court overlooked the distinction between acts under which third persons acquire rights and acts which simply affect Government officials in the execution of their duties, and in so overlooking such distinction failed to apply the proper rule to the statute under

consideration, and in holding the act directory its opinion was erroneous.

The act, so far, has been discussed generally. The conditions under which appellant's predecessor, the Northern Pacific Railroad Company, was incorporated and the conditions under which it received from the United States the land by the means of which part of its railroad was constructed, placed appellant in an entirely different position with respect to the act of 1873 as amended and re-enacted, from that occupied by railroads which are not organized under the laws of the United States and are not land-aided, and make the act, as to it, mandatory.

The terms of the act under which appellant received the land which was granted to it by Congress provided that it should transport the mails over its road "at such price as Congress may by law direct." The Northern Pacific Railroad Company, the predecessor of appellant, was incorporated under the laws of the United States, and by the act of its incorporation it was made a post route and made "subject to such regulations as Congress may impose, restricting the charges for such Government transportation."

In so far as appellant is concerned, it would seem clear that the act of 1873 as amended and re-enacted was part of its contract with the Government, and that if the Postmaster General refused to readjust the compensation paid for the transportation of the mails under the act of 1873 that appellant could by mandamus compel him so to do. It is further apparent that appellant could compel the Postmaster General to readjust such compensation upon the "pay per mile per annum," and that if the Postmaster General refused so to readjust, mandamus would lie. It would seem clear from the wording of the act that if the Postmaster General endeavored to obtain the average weight of the mails by selecting the Tuesdays and Wednesdays of each week to comprise the weighing period, that appellant could by mandamus compel the Postmaster General to obtain the

average weight by using "successive" days. It seems clear, also, that if the Postmaster General attempted to obtain the average weight by using a weighing period of less than 90 days that the appellant could force him to obtain the average daily weight of its mails by using a weighing period of not less than 90 days. The statement of these several propositions carries the argument for each with it. It could hardly be contended that appellant could insist upon the performance by the Postmaster General of each of the above terms of the statute and could not equally insist that the weighing period consist of "working days." If appellant could insist upon the successive character of the days to be included in the weighing period it could insist upon the kind of days to be included in the weighing period. If appellant could insist upon the minimum number of working days to be included within the weighing period, it could insist upon the kind of days to be included in the weighing period. It therefore follows that as to land-grant routes the statute is mandatory as to the character of the days to be included in the weighing period, and that if the words "working days" mean secular days then appellant can insist that the weighing period be composed of secular days.

Conclusion.

It is, therefore, respectfully submitted that the decision of the lower court should be reversed, with directions to compute judgment for appellant in accordance with the following principles:

1. On routes on which mail is carried six days in each week, in determining the average daily weight of the mail, the weighing period shall consist of days upon which mail is carried, and the total weight of the mail carried during the weighing period shall be divided by the total number of

days upon which mail is carried to find the average daily weight.

2. On routes on which mail is carried seven days in each week, in determining the average daily weight of the mails, the weighing period shall consist of working days, and mail carried on Sunday shall be treated as Monday mail and the weight thereof added to the Monday weighing, and the total weight of the mail carried during the weighing period shall be divided by the total number of working days composing such weighing period to find the average daily weight.

Respectfully submitted,

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